DD Sept 12th/72

THE

CODE

OF

CIVIL PROCEDURE

OF THE

STATE OF CALIFORNIA.

ADOPTED MARCH 11TH, 1872; TO TAKE EFFECT JANUARY 1ST, 1873.

WITH

References to the Decisions of the Supreme Court; and Notes showing the changes made in the different Statutes consolidated in the Code, since their original adoption.

COMPILED BY

WARREN OLNEY,

OF THE SAN FRANCISCO BAR.

SAN FRANCISCO:

SUMNER WHITNEY & COMPANY,

613 CLAY STREET.

1872.

PREFACE.

THE object of this edition of the Code of Civil Procedure is to give, in compact form, the text of the Code, together with amending or conflicting Acts of the last session of the legislature, and, by means of notes and italics, to show the difference between the Code and the present law, and what changes have been made, from time to time, in the present Probate and Practice Acts, since their adoption.

The numbers of the corresponding sections of the Probate and Practice Acts are given in the parentheses.

Where existing statutes, other than the Practice and Probate Acts, are incorporated in any section, they are referred to in the notes beneath the section.

Where the Code varies from the present law only by the addition of a clause, such clause is printed in italics, but where there is any material variation, the existing statute is given in full, with references to any changes made since its original adoption.

Sections which contain provisions not heretofore embraced in our statutes are preceded by "(N. S.)," and those made *expressly* applicable to Justices' Courts are preceded by an asterisk.

The references to decisions are believed to contain a full and accurate list of those bearing directly upon the particular sections under which they are given.

I hope that time and use will show very few errors or omissions in this edition of the Code. The very short time allowed to prepare the notes and references for the printer is the excuse offered for any defects which may be found in them.

Every possible precaution has been taken to insure accuracy in the text of the statute, and as a final revision, after the whole had been stereotyped, the proof sheets were carefully compared with the original text, and the few immaterial errors found, noted in the *errata*.

WARREN OLNEY.

SAN FRANCISCO, August, 1872.

ERRATA.

§ 400, first line, read the title *to* or possession of.
§ 542, sixth line of 5th sub-division, read *or* for on.
§ 612, second line, read papers which have been received as evidence in the cause *except depositions* or copies.
§ 634, last line, read *in* for upon.
§ 653, second line, read *or* for as.
§ 657, second line of 1st subdivision, erase *any*.
§ 689, second line, read *may* for must.
§ 720, second line, read or *to be* indebted.
§ 945, eighth line, erase *"be."*
§ 1055, read *gives* for give.
§ 1127, read *have* for has.
§ 1283, fourth line, read of *a* county.
§ 1294, last line, read *"is* first made" for shall first be made.
§ 1374, fifth line, read file *a* petition.
§ 1552, fifth line, read and the return *is* made.
§ 1601, fourth line, read *is* for shall be.
§ 1727, seventh line, read *are* for is.
§ 1733, fifth line, read *administrator* for administration.
§ 1818, ninth line read *have* for has.

CREED HAYMOND,
JOHN C. BURCH,
JOHN H. McKUNE,
Revision Commissioners.

CAMERON H. KING,
WILL J. BEATTY,
CURTIS H. LINDLEY,
Secretaries of Revision Commission.

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§ 99	§ 1424	§ 138	§ 1502
§ 100	§ 1427	§ 139	§ 1503
§ 101	§ 1428	§ 140	§ 1504
§ 102	§ 1429	§ 141	§ 1505
§ 103	§ 1430	§ 142	§ 1507
§ 104	§ 1432–33	§ 143	§ 1508
§ 105	§ 1443	§ 144	§ 1509
§ 106	§ 1444	§ 145	§ 1510
§ 107	§ 1445	§ 146	§ 1511
§ 108	§ 1446	§ 147	§ 1512
§ 109	§ 1447	§ 148	§ 1517
§ 110	§ 1448	§ 149	§ 1518
§ 111	§ 1449	§ 150	§ 1522–23
§ 112	§ 1450	§ 151	§ 1525
§ 113	§ 1451	§ 152	§ 1526
§ 114	§ 1452–53	§ 153	§ 1526
§ 115	§ 1516	§ 153	§ 1530–33
§ 116	§ 1458	§ 154	§ 1536

Probate Act.	Code C. P.	Probate Act.	Code C. P.
§ 155	§ 1537	§ 193	§ 1576
§ 156	§ 1538	194	§ 1581
§ 157	§ 1539	195	§ 1582
§ 158	§ 1540	§ 196	§ 1583
§ 159	§ 1539	§ 197	§ 1584
§ 160	§ 1541	§ 198	§ 1585
§ 161	§ 1542	§ 199	§ 1586
§ 162	§ 1543	§ 200	§ 1587
§ 163	§ 1544	§ 201	§ 1588
§ 164	§ 1545	§ 202	§ 1589
§ 165	§ 1546	§ 203	§ 1590
§ 166	§ 1547	§ 204	§ 1591
§ 167	§ 1548–50	§ 205	§ 1597
§ 168	§ 1551	§ 206	§ 1598
§ 169	§ 1552	§ 207	§ 1599
§ 170	§ 1553	§ 208	§ 1600
§ 171	§ 1554	§ 209	§ 1601
§ 172	§ 1555	§ 210	§ 1602
§ 173	§ 1556	§ 211	§ 1603
§ 174	§ 1557	§ 212	§ 1604
§ 175	§ 1558	§ 213	§ 1605
§ 176	§ 1559	§ 214	§ 1606–7
§ 177	§ 1560	§ 215	§ 1612
§ 178	§ 1561	§ 216	§ 1613
§ 179	§ 1562	§ 217	§ 1614
§ 180	§ 1563	§ 218	§ 1615
§ 181	§ 1564	§ 219	§ 1616
§ 182	§ 1565	§ 220	§ 1617
§ 183	§ 1566	§ 221	§ 1618
§ 184	§ 1567	§ 222	§ 1622
§ 185	§ 1568	§ 223	§ 1623
§ 186	§ 1569–70	§ 224	§ 1624
§ 187	§ 1569	§ 225	§ 1625
§ 188	§ 1571	§ 226	§ 1626
§ 189	§ 1572	§ 227	§ 1627
§ 190	§ 1573	§ 228	§ 1628
§ 191	§ 1574	§ 229	§ 1629
§ 192	§ 1575	§ 230	§ 1630

Probate Act.	Code C. P.
§ 231	§ 1631
§ 232	§ 1632
§ 233	§ 1633
§ 234	§ 1635
§ 235	§ 1636
§ 236	§ 1636
§ 237	§ 1637
§ 238	§ 1638
§ 239	§ 1643
§ 240	§ 1644
§ 241	§ 1645
§ 242	§ 1646
§ 243	§ 1647
§ 244	§ 1648
§ 245	§ 1649
§ 246	§ 1650
§ 247	§ 1651
§ 248	§ 1652
§ 249	§ 1653
§ 250	§ 1658
§ 251	§ 1659
§ 252	§ 1660
§ 253	§ 1661
§ 254	§ 1661
§ 255	§ 1661
§ 256	§ 1661
§ 257	§ 1662
§ 258	§ 1665
§ 259	§ 1666–67
§ 260	§ 1668–69
§ 261	§ 1675
§ 262	§ 1677
§ 263	§ 1676
§ 264	§ 1678
§ 265	§ 1679
§ 266	§ 1680
§ 267	§ 1681
§ 268	§ 1682
§ 270	§ 1683
§ 271	§ 1684
§ 272	§ 1685
§ 273	§ 1686
§ 274	§ 1691
§ 275	§ 1692
§ 276	§ 1693
§ 277	§ 1695
§ 278	§ 1696
§ 279	§ 1697
§ 280	§ 1698
§ 281	§ 1436
§ 282	§ 1411
§ 283	§ 1437
§ 284	§ 1438
§ 285	§ 1439
§ 286	§ 1440
§ 287	§ 1704–5
§ 288	§ 1710
§ 289	§ 1709
§ 290	§ 1711
§ 291	§ 2093
§ 293	§ 1713
§ 294	§ 1616–17
§ 295	§ 1718
§ 296	§ 1719
§ 297	
§ 298	
§ 299	
§ 300	
§ 301	
§ 302	§ 1720
§ 302	§ 1738
§ 302	§ 1739
§ 304	§ 1728
§ 305	§ 1729
§ 305	§ 1741–42
§ 306	§ 1730

See §§ 969–971

Probate Act.	Code C. P.
§ 307	§ 1731
§ 308	§ 1732
§ 309	§ 1733
§ 310	§ 1734
§ 311	§ 1735
§ 312	§ 1736
§ 315	See Civil Code §§ 1385–1399
§ 316	
§ 317	
§ 318	
§ 319	
§ 320	
§ 321	
§ 322	
§ 323	
§ 324	
§ 325	
§ 326	
§ 328	§ 1269
§ 329	§ 1271
§ 331	§ 1272
§ 336	§ 1747
§ 337	§ 1748
§ 338	§ 1749
§ 339	§ 1750
§ 340	§ 1751
§ 341	§ 1752
§ 342	§ 1753–54
§ 343	§ 1754
§ 344	§ 1757
§ 345	§ 1758
§ 346	§ 1759
§ 347	§ 1763
§ 348	§ 1764
§ 349	§ 1765
§ 350	§ 1768
§ 351	§ 1769
§ 352	§ 1770
§ 353	§ 1772
§ 354	§ 1773
§ 355	§ 1777
§ 356	§ 1778
§ 357	§ 1779
§ 358	§ 1780
§ 359	§ 1781
§ 360	§ 1782
§ 361	§ 1783
§ 362	§ 1784
§ 363	§ 1785
§ 364	§ 1786
§ 365	§ 1787
§ 366	§ 1788
§ 367	§ 1789
§ 368	§ 1790
§ 369	§ 1806
§ 370	§ 1774
§ 371	§ 1792
§ 372	§ 1801
§ 373	§ 1802
§ 374	§ 1803
§ 375	§ 1804
§ 376	§ 1805
§ 377	§ 1800
§ 378	§ 1793
§ 379	§ 1794
§ 380	§ 1795
§ 381	§ 1796
§ 382	§ 1776
§ 383	§ 1807
§ 384	§ 1775
§ 385	§ 1791
§ 386	§ 1797
§ 387	§ 1798
§ 388	§ 1799
§ 389	Civil Code Sections 261–267
§ 390	
§ 391	
§ 392	

AN ACT TO ESTABLISH A

CODE OF CIVIL PROCEDURE.

The People of the State of California represented in Senate and Assembly, do enact as follows:

SECTION 1. Title and division of this volumne.

§ 1. This Act shall be known as THE CODE OF CIVIL PROCEDURE OF CALIFORNIA, and is divided into four parts, as follows:

PART I. Of Courts of Justice.
II. Of Civil Actions.
III. Of Special Proceedings of a Civil Nature.
IV. Of Evidence.

THE

CODE OF CIVIL PROCEDURE

OF CALIFORNIA.

PRELIMINARY PROVISIONS.

SECTION 2. When this code takes effect.
3. Not retroactive.
4. Rule of construction of this code.
5. Provisions similar to existing laws, how construed.
6. Tenure of office preserved.
7. Construction of repeal as to certain officers.
8. Actions, etc., not affected by this code.
9. Limitations shall continue to run.
10. Holidays.
11. Same.
12. Computation of time.
13. Certain acts not to be done on holidays.
14. "Seal" defined.
15. Joint authority.
16. Words and phrases.
17. Certain terms used in this code defined.
18. Statutes, etc., inconsistent with code repealed.
19. This act, how cited, enumerated.
20. Judicial remedies defined.
21. Division of judicial remedies.
22. Action defined.
23. Special proceeding defined.
24. Division of actions.
25. Civil actions arise out of obligations or injuries.
26. Obligation defined.
27. Division of injuries.
28. Injuries to property.
29. Injuries to the person.
30. Civil action, by whom prosecuted
31. Criminal actions.
32. Civil and criminal remedies not merged.

§ 2. This code takes effect at twelve o'clock noon, on the first day of January, eighteen hundred and seventy-three.

§ 3. No part of it is retroactive, unless expressly so declared.

4 Cal. 153-4.

§ 4. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this State respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice. N. Y. C. Civ. Prac. § 3.

7 Cal. 291; 17 Cal. 497.

§ 5. The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments.

§ 6. All persons who at the time this code takes effect hold office under any of the acts repealed continue to hold the same according to the tenure thereof, except those offices which are not continued by one of the codes adopted at this session of the Legislature.

§ 7. When any office is abolished by the repeal of any act, and such act is not in substance re-enacted or continued in either of the codes, such office ceases at the time the codes take effect.

§ 8. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this code as far as applicable.

§ 9. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or any limitation is prescribed in this code, the time of limitation continues to run, and has the like effect as if the whole period had begun and ended after its adoption.

§ 10. Holidays within the meaning of this code are: every Sunday, the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving or holiday.

§ 11. If the first day of January, the twenty-second day of February, or the twenty-fifth day of December falls upon a Sunday, the Monday following is a holiday.

§ 12. The time in which any act provided by law is to be done, is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

§ 13. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed.

§ 14. When the seal of a court, public officer, or person, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

3 Cal. 315; 5 Cal. 220

§ 15. Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

§ 16. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to some peculiar and appropriate meaning or definition.

§ 17. Whenever the terms mentioned in this section are employed in this code, they are employed in the senses hereafter affixed to them, except where a different sense plainly appears:

1. The term "signature" includes any name, mark or sign written with intent to authenticate any instrument or writing.

2. The term "writing" includes both printing and writing.

3. The term "land" and the phrases "real estate" and "real property," include lands, tenements and hereditaments, and all rights thereto and interests therein.

4. The words "personal property" include money, goods, chattels, evidence of debt, and "things in action."

5. The word "property" includes personal and real property.

6. The word "month" means a calendar month, unless otherwise expressed, and the word "year," and also the abbreviation "A. D." is equivalent to the expression "year of our Lord."

7. The word "oath" includes "affirmation" in all cases where an affirmation may be substituted for an oath; and in like cases the word "swear" includes the word "affirm." Every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose."

8. The word "state," when applied to the different parts of the United States, includes the district of Columbia and the territories, and the words "United States" may include the district and territories.

9. Where the term "person" is used in this code to designate the party whose property may be the subject of any offence, action or proceeding, it includes this state, any other state, government or country which may lawfully own any property within this state, and all public and private corporations or joint associations, as well as individuals.

10 The word "person" includes bodies politic and corporate.

11. The singular number includes the plural, and the plural the singular.

12. Words used in the masculine gender comprehend, as well, the feminine and neuter.

13. Words used in the present tense include the future, but exclude the past.

14. The word "will" includes codicils.

15. The word "writ" signifies an order or precept in writing issued in the name of the people, or of a court or judicial officer.

16. "Process" is a writ or summons issued in the course of judicial proceedings.

17. The word "vessel" when used with reference to shipping, includes ships of all kinds, steamboats, and steamships, canal boats, and every structure adapted to be navigated from place to place.

18. The term "peace officer" signifies any one of the officers mentioned in section eight hundred and seventeen of the Penal Code.

19. The term "magistrate" signifies any one of the officers mentioned in section eight hundred and eight of the Penal Code.

§ 18. No statute, law or rule is continued in force, because it is consistent with the provisions of this code on the same subject; but in all cases provided for by the code, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated.

This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it affect any private statute not expressly repealed.

§ 19. This Act whenever cited, enumerated, referred to, or amended, may be designated as the "Code of Civil Procedure," adding when necessary the number of the section.

§ 20. Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this state. N. Y. C. C. P., § 5.

§ 21. These remedies are divided into two classes:

1. Actions; and,
2. Special proceedings.

§ 22. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 23. Every other remedy is a special proceeding.

§ 24. Actions are of two kinds:

1. Civil; and.
2. Criminal.

§ 25. A civil action arises out of—

1. An obligation.
2. An injury.

§ 26. An obligation is a legal duty, by which one person is bound to the performance of an act towards another, and arises from—

1. The contract of the parties; or,
2. The operation of law.

§ 27. An injury is of two kinds:

1. To the person; and,
2. To property.

§ 28. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it.

§ 29 Every other injury is an injury to the person.

§§ 20-29 are taken from N. Y. C. C. P., §§ 5-14.

§ 30. A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong. N. Y. C. C. P., § 16.

§ 31. The Penal Code defines and provides for the prosecution of a crimlnal action.

§ 32. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. N. Y. C. C. P., § 18.

PART I.

OF COURTS OF JUSTICE.

TITLE I. COURTS OF JUSTICE—THEIR ORGANIZATION, JURISDICTION AND TERMS. §§ 33–152.

TITLE II. JUDICIAL OFFICERS. §§ 156–187.

TITLE III. PERSONS INVESTED WITH JUDICIAL POWERS. §§ 190–259.

TITLE IV. MINISTERIAL OFFICERS OF COURTS OF JUSTICE. §§ 262–271.

TITLE V. PERSONS INVESTED WITH MINISTERIAL POWERS. §§ 275–304.

TITLE I.

OF THEIR ORGANIZATION, JURISDICTION AND TERMS.

CHAPTER I. OF COURTS OF JUSTICE IN GENERAL. §§ 33–34.
II. OF THE COURT FOR THE TRIAL OF IMPEACHMENTS. §§ 35–38.
III. OF THE SUPREME COURT. §§ 40–50.
IV. OF THE DISTRICT COURTS. §§ 54–78.
V. OF THE COUNTY COURTS. §§ 82–90.
VI. OF THE PROBATE COURTS. §§ 94–100.
VII. OF THE MUNICIPAL CRIMINAL COURT OF SAN FRANCISCO. §§ 104–110.
VIII. OF JUSTICES' COURTS. §§ 112–118.
IX. OF POLICE COURTS. § 121.
X. GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE. §§ 124–152.

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

SECTION 33. The several Courts of this State.
34. Courts of Record.

§ 33. The following are the courts of justice of this State:

1. The court for the trial of impeachments.
2. The supreme court.
3. The district courts.
4. The county courts.
5. The probate courts.
6. The municipal criminal court of San Francisco.
7. The justices' courts.
8. The police courts.

Based upon Stat. 1863, p. 233, adding Municipal Criminal Court, (Stat. 1863–'70, p. 528), and substituting "police courts" for "recorders," etc. Of courts in general and their jurisdiction. 1 Cal. 485; 2 Cal. 74, 308; 3

Cal. 130; 4 Cal. 368; 5 Cal. 43, 195, 237; 6 Cal. 143, 350, 685; 7 Cal. 65, 54; 8 Cal. 26, 562; 9 Cal. 607, 697; 10 Cal. 49; 12 Cal. 128, 306; 13 Cal. 24; 16 Cal. 432; 17 Cal. 517; 19 Cal. 210, 374; 21 Cal. 415, 438; 23 Cal. 585; 25 Cal. 49; 27 Cal. 163; 30 Cal. 435, 439; 31 Cal. 342; 32 Cal. 241; 33 Cal. 279, 505. Hahn vs. Kelley, 34 Cal. 391; 37 Cal. 69, 268, 458; 38 Cal. 393; 39 Cal. 157.

§ 34. The courts enumerated in the first six subdivisions of the preceding section are courts of record.

CHAPTER II.

OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.

SECTION 35. Members of the court.
36. Jurisdiction.
37. Officers of the court.
38. Trial of impeachments provided for in penal code.

§ 35. The court for the trial of impeachments is composed of the members of the senate, or a majority of them

§ 36. The court has power to try impeachments, when presented by the assembly, of the governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, justices of the supreme court and judges of the district courts, for any misdemeanor in office.

Const. art. 4, § 18.

§ 37. The clerk and officers of the senate are the clerk and officers of the court.

§ 38. Proceedings on the trial of impeachments are provided for in the penal code.

See penal code, chapter 1, title II, part II.

CHAPTER III.

OF THE SUPREME COURT.

SECTION 40. Members of the court.
41. Chief justice.
42. Jurisdiction of two kinds.
43. Original jurisdiction.
44. Appellate jurisdiction.
45. May reverse, affirm or modify, etc., remittitur.
46. Number of judges necessary for the transaction of business.
47. Number to pronounce judgment.
48. Court always open for certain purposes.
49. Terms, when held, additional terms.
50. Terms, where held.

§ 40. The supreme court consists of a chief justice and four associate justices, elected at the judicial elections, and holding their offices for the term of ten years from the first day of January next after their election.

Const. art. 6, §§ 2-3, Stat. 1863, 333. 2 Cal. 198, 610.
The eligibility and residence of justices is provided for in § 156.

§ 41. The justice having the shortest term to serve is the chief justice.

Stat. 1863, 323.

[*An Act to determine who must act as Chief Justice of the Supreme Court.*

SECTION 1. That Justice of the Supreme Court, elected by the people, who has the shortest term to serve under his commission is the Chief Justice after the expiration of the term of the present Chief Justice.

SEC. 2. In case two or more of the Justices of the Supreme Court shall be equally entitled to the office of Chief Justice after the expiration of the term of the present Chief Justice, and neither of the two shall voluntarily and in writing waive his right to be such Chief Justice, then such Justices shall determine by lot which of them shall hold such office, and a record of the allotment or waiver shall be entered in the minutes of the Court, and a certified copy thereof shall be transmitted to the Secretary of State and be filed in his office.—*Approved March* 14, 1872. *Statute* 1871-2, *p.* 364.]

§ 42. The jurisdiction of this court is of two kinds:

1. Original; and,
2. Appellate.

Generally. 5 Cal. 85, 90, 134, 143, 347; 7 Cal. 181; 8 Cal. 297; 10 Cal. 249; 11 Cal. 175; 14Cal. 230; 15 Cal. 75; 19 Cal. 124; 20 Cal. 141, 387; 21 Cal. 166; 22 Cal. 82; 26 Cal. 383, 273; 28 Cal. 115; 31 Cal. 107; 34 Cal. 28, 167; 36 Cal. 328; 37 Cal. 437.

§ 43. Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, habeas corpus and all writs necessary to the exercise of its appellate jurisdiction.

The Const. art. 6, § 4, prior to 1862, read: "And the said court, and each of the justices thereof, as well as all district and county judges, shall have power to issue writs of habeas corpus at the instance of any person held in actual custody. They shall also have power to issue all other writs and process necessary to the exercise of their appellate jurisdiction, and shall be conservators of the peace throughout the State."

As amended in 1862, in reads: "The court shall also have power to issue writs of mandamus, certiorari and prohibition, and habeas corpus; and also all writs necessary or proper to the complete exercise of its appellate jurisdiction; each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition on behalf of any person held in actual custody, and may make such writs returnable before himself, or the supreme court, or before any district court, or any county court, in the State, or before any judge of said courts."

See stat. 1863, 334.

The provisions concerning the writ of habeas corpus have been inserted in the Penal Code, Part ii, Title xii.

Mandamus. 25 Cal. 26; 28 Cal. 633; 36 Cal. 283; 39 Cal. 189; 1 Cal. 143; 14 Cal. 231;

Certiorari. 25 Cal. 26, 95; 30 Cal. 98; 40 Cal. 481; 1 Cal. 143, 152; 18 Cal. 60; 21 Cal. 166.

Habeas corpus. 25 Cal. 26; 1 Cal. 143; 11 Calif. 222; 18 Cal. 60; 22 Cal. 179; 23 Cal. 585.

Prohibition. 25 Cal. 26; 1 Cal. 143.

§ 44. Its appellate jurisdiction extends—

1. To all civil actions for relief formerly given in courts of equity.

2. To all civil actions in which the subject of litigation is not capable of pecuniary estimation.

3. To all civil actions in which the subject of litigation is capable of pecuniary estimation, which involve the title or possession of real estate, or the legality of any tax, impost,

assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

4. To all special proceedings.

5. To all cases arising in the probate courts; and,

6. To all criminal actions amounting to felony, on questions of law alone.

§ 4 of article 6 of the constitution, as it stood prior to amendments of 1862, was as follows: "The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost, or municipal fine is in question, and in all criminal cases amounting to felony, on questions of law alone. * * * * * * * * * * * * *

And as amended in 1862, (stat. 1863, 334,) is as follows: "The supreme court shall have appellate jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also, in all cases arising in the probate courts: and also, in all criminal cases amounting to felony, on questions of law alone." Stat. 1863, 334.

The supreme court shall have jurisdiction to review, upon appeal:

First—A final judgment in any of the cases mentioned in the preceding section; and to review, upon the appeal from such judgment, any intermediate order or decision, involving the merits, and necessarily affecting the judgment.

Second—An order granting or refusing a new trial; an order granting or dissolving an injunction; and an order refusing to grant or dissolve an injunction; and any special order made after final judgment.

SUB-DIVISION 3—Real property: 31 Cal. 140. Tax, etc.: 30 Cal. 98. Money demands, etc.: 1 Cal. 15; 2 Cal. 156; 12 Cal. 280; 13 Cal 28; 14 Cal. 278; 15 Cal. 406; 18 Cal. 409, 693; 20 Cal. 89, 173, 174; 23 Cal. 61, 199, 285; 27 Cal. 106; 28 Cal. 180; 30 Cal. 545; 34 Cal. 28.

SUB-DIVISION 4: 31 Cal. 82.

SUB-DIVISION 6: 5 Cal. 295; 7 Cal. 139, 165; 30 Cal. 98; 35 Cal. 390.

§ 45. The court may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. Its judgment must be remitted to the court from which the appeal was taken.

Based upon stat. 1863, 334. See §§ 956, 957.

§ 46. The presence of three justices is necessary for the transaction of business, but one or more of the justices may

[RECONSTRUCTED.]

§ 50. The April and October terms of this court shall be held at the capital of the state. If proper rooms in which to hold the court, and for the accommodation of the officers thereof are not provided by the state, together with attendants, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff of the county in which it is held to provide such rooms, attendants, furniture, fuel, lights and stationery, and the expenses thereof, certified by a majority of the justices to be correct, must be paid out of the state treasury. The January and July terms of this court may be held at the city and county of San Francisco, provided the board of supervisors thereof, at the discretion of said board, shall procure and maintain at the expense of said city and county, rooms and furniture acceptable to the justices of said court for the accommodation of the business thereof, and of its respective officers, together with necessary attendants, fuel and lights, and the board of supervisors of said city and county are hereby authorized to appropriate all necessary funds to defray the expenses aforesaid, payable out of the general fund of said city and county. If the said board of supervisors shall accept the provisions of this act and procure the necessary rooms and furniture at said city and county for the accommodation of said court and its officers, then it shall be the duty of said board to permanently maintain such rooms and furniture, together with the necessary attendants, fuel and lights, and upon the failure of said board so to do, after having accepted the provisions of this act as aforesaid, the court may direct the sheriff of said city and county to provide such rooms, furniture, fuel and lights, and the expenses thereof, certified by a majority of the justices to be correct, shall be a charge against said city and county, and must be paid out of the general fund thereof. Until such time as the board of supervisors of said city and county shall accept the provisions of this act, the January and July terms of this court shall continue to be held at the capital of the state, provided, that in no event shall the state hereafter be put to any additional expense of any kind, character or nature, by reason of the holding of any term or terms of said court, at said city and county of San Francisco. (In effect March 30, 1874.)

AMENDMENTS

TO THE

CODE OF CIVIL PROCEDURE

Which take effect prior to July 1st, 1874.

ERRATA: §§ 270–274 take effect July 1st, 1874.

PRESENTED WITH THE COMPLIMENTS OF

SUMNER WHITNEY & CO.,

LAW PUBLISHERS.

transact such business as can be done at chambers, and may adjourn the court from day to day, with the same effect as if all were present.

§ 47. The concurrence of three justices is necessary to pronounce a judgment; if three do not concur, the case must be reheard.

Stat. 1863, 334: "§ 11. The presence of three justices shall be necessary for the transaction of business, excepting such business as may be done at chambers; and the concurrence of three justices shall be necessary to pronounce a judgment. Whenever questions of importance are involved in the cases decided, and are passed upon by the court, the reasons or grounds of the decision shall be given in a written opinion accompanying the same." 13 Cal. 24.

§ 48. For the purpose of issuing writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate jurisdiction, filing opinions and entering orders and judgments, this court is always open and in session.

§ 49. There must be four terms in each year, for the hearing of causes, to commence on the second Monday of January, April, July and October. Additional terms may also be held by order of the court.

Stat. 1863, 334: "§ 10. There shall be four terms of this court in each year for the hearing of causes, to commence on the first Monday of January, April, July and October, and to continue until the fourth Saturday thereafter, inclusive, unless all the cases ready for hearing are sooner disposed of. If all the cases ready for hearing be not disposed of, the terms may be continued so much longer as in the opinion of the court the public interest shall require. The court shall be deemed always open for the filing of opinions and the rendition of judgment and orders."

Stat. 1869–70, 382: "§ 10. There shall be four terms of the court in each year, for the hearing of causes, to commence respectively on the second Monday of January, April, July and October. The court shall be deemed always open for the filing of opinions and the rendition of judgments and orders."

§ 50. The terms of this court must be held at the capital of the state. If proper rooms in which to hold the court, and for the chambers of the justices, are not provided by the state, together with attendants, furniture, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court

may direct the sheriff of the county in which it is held to provide such rooms, attendants, furniture, fuel, lights and stationery, and the expenses thereof, certified by a majority of the justices to be correct, must be paid out of the state treasury.

Stat. 1868, 334.

Power to make rules §§ 129-130. To change place of holding court § 142.

An Act to regulate Practice in the Supreme Court.

Approved March 16, 1872.

§ 1. Every civil cause on appeal in the Supreme Court must be decided, and the decision of the Court filed within six months after the same is submitted; if not so decided, and the decision filed, the cause may, on notice of either party, of at least thirty days, to the adverse party, be again placed on the calendar for a re-argument.

§ 2. Every cause which shall have been pending on appeal in said Court, for a period of six months prior to the taking effect of this Act, and shall have been submitted, shall, on notice filed and served, by either party on the adverse party and the Clerk of the Court, thirty days before the commencement of the next succeeding term, be placed on the calendar for that term for re-argument.

CHAPTER IV.

OF THE DISTRICT COURTS.

SECTION 54. Judicial districts.
55. Court in each district.
56. Judges—election and terms of.
57. Jurisdiction.
58-74. Terms of court in the several districts.
75. Terms of the district court, where held.
76. Duration of terms.
77. Adjournment of the court.
78. Judgments may be entered in vacation.

§ 54. The state is divided into seventeen judicial districts.

[An act approved February 20th, 1872, created the eighteenth judicial district by a division of the seventeenth district.]

[An act approved March 8th, 1872, created the nineteenth and twentieth judicial districts by a division of the third, fourth, twelfth and fifteenth districts.]

§ 55. There must be a district court held in each of the judicial districts.

§ 56. The judge thereof is elected by the electors of the district, at the judicial elections, and holds his office for the term of six years from the first day of January next succeeding his election.

Const. art. VI, § 5, stat. 1863, p. 335. As to residence and eligibility of judges, see §§ 157-159. As to appointment in case of vacancy. See political code. 11 Cal. 49, 77; 12 Cal. 378; 17 Cal. 11.

§ 57. The jurisdiction of the district courts extends—

1. To all civil actions for relief formerly given in courts of equity.

2. To all civil actions in which the subject of litigation is not capable of pecuniary estimation.

3. To all civil actions (except actions of forcible entry and detainer) in which the subject of litigation is capable of pecuniary estimation, which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

4. To all special proceedings not within the jurisdiction of the county and probate courts, as defined in this code.

5. To the issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its powers.

6. To the trial of all indictments for treason, misprision of treason, murder and manslaughter.

The const. art vi, prior to 1862, read; "§ 6. The district courts shall have original jurisdiction, in law and equity, in all civil cases where the

amount in dispute exceeds two hundred dollars, exclusive of interest. In all criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts, their jurisdiction shall be unlimited." As amended in 1862, it reads: "§ 6. The district courts shall have original jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest, in the value of the property in controversy, amounts to three hundred dollars; and also, in all criminal cases not otherwise provided for. The district courts and their judges shall have power to issue writs of habeas corpus, on petition by, or on behalf of, any person held in actual custody in their respective districts."

The statute 1863, 335, repeated the above and added: "and also all writs necessary or proper to the complete exercise of the powers conferred upon them by the constitution and by this and other statutes:" it also inserted: "§ 21. In all the counties of this State the district courts shall have jurisdiction to try and determine all indictments transmitted to them from the county courts in the cases provided by law."

Of district courts in general. 2 Cal. 309; 3 Cal. 219, 379, 389, 464; 4 Cal. 186, 280, 342, 225; 5 Cal. 52, 117; 9 Cal. 19, 77, 607; 10 Cal. 495; 12 Cal. 433; 17 Cal. 314; 21 Cal. 166; 24 Cal. 93; 30 Cal. 573; 32 Cal. 414; 33 Cal. 212, 484; 34 Cal. 391; 36 Cal. 159, 193, 281, 552; 38 Cal. 85, 428; 39 Cal. 315; 40 Cal. 183.

SUB-DIVISION 1: 5 Cal. 297; 7 Cal. 348; 21 Cal. 76; 24 Cal. 491; 36 Cal. 290, 379; 36 Cal. 639.

SUB-DIVISION 3: Real estate: 17 Cal. 67; 31 Cal. 140, 338; 38 Cal. 683. Taxes, etc.: 34 Cal. 575: 28 Cal. 327; 24 Cal. 61. Money demands, etc.: 4. Cal. 89; 5 Cal. 95; 9 Cal. 248; 34 Cal. 28.

SUB-DIVISION 5: Mandamus: 26 Cal. 372; 30 Cal. 573, 244. Certiorari: 4 Cal. 185; 7 Cal. 113; 8 Cal. 58; 23 Cal. 492; 26 Cal. 372. Habeas corpus: 5 Cal. 585; 26 Cal. 372.

SUB-DIVISION 6: 32 Cal. 140.

§§ 58–74. Fix the terms of the several district courts; these as modified by the laws of the nineteenth session—1871–72, are stated in the following alphabetical table.

§ 75. The terms of the district courts must be held at the county seats of the several counties.

§ 76. Each term must be held until the business is disposed of, or until a day fixed for the commencement of some other term in the district.

Stat. 1863, 336; 40 Cal. 134.

§ 77. The court may adjourn from time to time during the term, and may, when the public convenience requires, adjourn the term over the time fixed by law for the commencement of another term in the same district.

Stat. 1863, 336, reads: "And may be adjourned from time to time in the discretion of the court."

§ 78. Judgments and orders of this court may be entered either in term or vacation.

Stat. 1863, 336.

TERMS OF DISTRICT COURTS.

COUNTY.	DISTRICT.	DISTRICT COURTS.
Alameda.....	Third.....	3d Monday February, June, and October.
Alpine *.....	Sixteenth...	1st Monday April and October.
Amador.....	Eleventh....	2d Monday March, June, September, and December.
Butte.....	Second.....	1st Monday March; 3d Monday November; 2d Monday July.
Calaveras.....	Eleventh....	2d Monday January, April, July, and October.
Colusa.....	Tenth.....	1st Monday May, September, and December.
Contra Costa...	Fifteenth....	3d Tuesday April, July, and November.
Del Norte.....	Eighth.....	2d Monday May, August, and November.
El Dorado.....	Eleventh....	2d Monday February and May; 3d Monday August and November.
Fresno.....	Thirteenth..	3d Monday January and May; 2d Monday October.
Humboldt.....	Eighth.....	2d Monday March, June, September, and December.
Inyo.....	Sixteenth...	1st Monday May and November
Kern.....	Sixteenth....	3d Monday May and November.
Klamath.....	Eighth.....	2d Monday April, July, and October.
Lake.....	Seventh.....	3d Monday April; 2d Monday November.
Lassen.....	Second.....	2d Monday June; 2d Monday September.
Los Angeles....	Seventeenth.	1st Monday February, May, August, and November.
Marin.....	Seventh.....	1st Monday March and July; 3d Monday November.
Mariposa.....	Thirteenth..	1st Monday February, June, and October.
Mendocino.....	Seventh.....	2d Monday April; 3d Monday July; 1st Monday November.
Merced.....	Thirteenth..	4th Monday January, May, and September.
Mono.....	Sixteenth...	3d Monday April and October.
Monterey.....	Twentieth...	3d Monday March, July, and November.
Napa.....	Seventh.....	1st Monday February, June, and October.
Nevada.....	Fourteenth..	2d Monday March, June, September, and December.
Placer.....	Fourteenth..	1st Monday February, May, August, and November.

Plumas	Second	4th Monday May; 1st Monday October.
Sacramento	Sixth	1st Monday February, April, June, August, October, and December.
San Bernardino	Eighteenth	2d Monday March, June, September, and December.
San Diego	Eighteenth	2d Monday January, April, July, and October.
San Francisco	Third	3d Monday April, August, and December.
	Fourth	1st Monday February, May, August, and November.
	Twelfth	1st Monday January, April, July, and October.
	Fifteenth	1st Monday March, June, September, and December.
	Nineteenth	2d Monday April, August, and December.
San Joaquin	Fifth	1st Monday February, May, August; 3d Monday October.
San Luis Obispo	First	1st Monday January, May, and September.
San Mateo	Twelfth	2d Monday February; 4th Monday May, August, and November.
Santa Barbara	First	3d Monday February, June, and October.
Santa Clara	Twentieth	1st Monday January, May, and September.
Santa Cruz	Twentieth	2d Monday February, June, and October.
Shasta	Ninth	2d Monday March, June, and November.
Sierra	Tenth	1st Monday April; 2d Monday July; 4th Monday October.
Siskiyou	Ninth	3d Monday January, May, and September; at Lake City 2d Monday July.
Solano	Seventh	3d Monday January, May, and September.
Sonoma	Seventh	3d Monday, February, June, and October.
Stanislaus	Fifth	2d Monday January, April, and September.
Sutter	Tenth	4th Monday February and June; 3d Monday October.
Tehama	Second	4th Monday October; 4th Monday January; 1st Monday May.
Trinity	Ninth	2d Monday April, August, and December.
Tulare	Thirteenth	1st Monday January and May; 3d Monday October.
Tuolumne	Fifth	1st Monday March and July; 3d Monday November.
Ventura	First	1st Monday March, July and November.
Yolo	Sixth	3d Monday January, May, and September.
Yuba	Tenth	3d Monday January, May, and September.

Terms of supreme court, second Monday of January, April, July, and October.
* Special Terms may be held in Alpine, Inyo, Mono, and Kern counties upon ten days' notice by judge to clerk.
† Sessions may be held at Truckee at the discretion of the judge.

TERMS OF COUNTY AND PROBATE COURTS.

COUNTY.	COUNTY COURTS.	PROBATE COURTS.
Alameda	1st Monday January, April, and July; 3d Monday Sept.	Same as County Court.
Alpine	1st Monday February, June, and October	Same as County Court.
Amador	1st Monday February, May, August, and November	Same as County Court.
Butte	1st Monday January, March, May, July, September, Nov	Same as County Court.
Calaveras	1st Monday March, June, September, and December	Same as County Court.
Colusa	3d Monday January, April, July, and October	1st Monday of each month.
Contra Costa	1st Monday March, August, and November	Same as County Court.
Del Norte	1st Monday April, July, and October	Same as County Court.
El Dorado	2d Monday March, June, September, and December	2d January, April, July, Oct.
Fresno	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Humboldt	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Inyo	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Kern	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Klamath	1st Monday April, July, and October	Same as County Court.
Lake	1st Monday January, April, July, and October	Same as County Court.
Lassen	1st Monday February, May, August, and November	Same as County Court.
Los Angeles	1st Monday January, March, May, July, Sept. Nov.	Same as County Court.
Marin	3d Monday March, June, September, and December	Same as County Court.
Mariposa	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Mendocino	1st Monday March, June, September, and December	Same as County Court.
Merced	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Mono	1st Monday January, May, and September	Same as County Court.
Monterey	1st Monday March, May, July, September, November	1st Monday of each month.
Napa	1st Monday March, Sept., December; 3d Monday June	Same as County Court.

Nevada	1st Monday February, May, August, and November	1st Monday of each month.
Placer	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Plumas	1st Monday March, June, September, and December	Same as County Court.
Sacramento	1st Monday January, April, July, and October	Same as County Court.
San Bernardino	1st Monday January, March, May, July, Sept., Nov.	4th Monday of each month.
San Diego	1st Monday January. March, May, July, Sept., Nov.	Same as County Court.
San Francisco	1st Monday January, March, May, July, Sept., Nov.	1st Monday of each month.
San Joaquin	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
San Luis Obispo	1st Monday March, June; 3d Monday Aug.; 1st Mon. Dec	Same as County Court.
San Mateo	2d Monday March, June, September, and December	Same as County Court.
Santa Barbara	1st Monday March, June, September, and December	Same as County Court.
Santa Clara	3d Monday February, May, August, and November	1st Monday of each month.
Santa Cruz	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Shasta	1st Monday January, May, and September	1st Feb, Ap, J'ne, A'g. Oct. Dec
Sierra	3d Monday April, June, and Sept.; 2d Monday December	1st Monday of each month.
*Siskiyou	1st Monday January, March, May, *July, Sept., Nov.	Same as County Court.
Solano	3d Monday April, August, and December	Same as County Court.
Sonoma	1st Monday January, April, July, and October	1st Monday of each month.
Stanislaus	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Sutter	1st Monday January, April, July, and October	1st Monday of each month.
Tehama	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Trinity	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Tulare	1st Monday January, March, May, July, Sept., Nov.	Same as County Court.
Tuolumne	1st Monday January, May, and September	4th Monday of each month.
Ventura	1st Monday February, June, and October	When necessity requires.
Yolo	1st Monday January, April, July, and October	Same as County Court.
Yuba	1st Monday January, April, July; 2d Monday October	1st Monday of each month.

San Francisco Municipal Court First Monday January, March, May, July, September, and November.

†Sessions may be held at Truckee at the discretion of the Judge.

* At Lake City Second Monday July.

CHAPTER V

OF THE COUNTY COURTS.

SECTION 82. Court in each county.
83. Judges—election and terms of.
84. Jurisdiction of two kinds.
85. Original jurisdiction.
86. Appellate jurisdiction.
87. Presumptions in favor of judgments, etc.
88. Terms of the county court for the respective counties.
89. Court always open for certain purposes.
90. Terms of the county court, where held.

§ 82. There must be a county court held in each of the counties, by the county judge thereof.

§ 83. The county judge is elected by the electors of the county, at the judicial elections, and holds his office for the term of four years from the first day of January next succeeding his election.

12 Cal. 394, 409; 14 Cal. 180.

§ 84. The jurisdiction of this court is of two kinds:

1. Original; and,
2. Appellate.

5 Cal. 52, 279; 6 Cal. 143; 19 Cal. 551; 35 Cal. 107, 213; 27 Cal. 67; 39 Cal. 98; 40 Cal. 642.

§ 85. Its original jurisdiction extends:

1. To actions to prevent or abate a nuisance.
2. To actions of forcible entry and detainer.
3. To proceedings in insolvency.
4. To all special cases or proceedings in which the law giving the remedy or authorizing the proceedings, confers the jurisdiction upon it.
5. To the issuance of writs of mandate, review, prohibition, habeas corpus and all writs necessary to the exercise of its powers.
6. To inquire, by the intervention of a grand jury, of all public offences committed or triable in the county.

7. To the trial of all indictments, except for treason, misprision of treason, murder and manslaughter.

The constiution prior to 1862, read: "§ 9. The county courts shall have such jurisdiction, in cases arising in justices' courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases;" as amended in 1862, it reads: "§ 8. The county courts shall have original jurisdiction of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, and of all such special cases and proceedings as are not otherwise provided for; and also such criminal jurisdiction as the legislature may prescribe; they shall also have appellate jurisdiction in all cases arising in courts held by justices of the peace, and recorders, and in such inferior courts as may be established in pursuance of section one of this article, in their respective counties. The county judges shall hold, in their several counties, probate courts, and perform such duties as probate judges as may be prescribed by law. The county courts and their judges shall also have power to issue writs of habeas corpus, on petition by, or on behalf of, any person in actual custody in their respective counties."

Stat. 1863, p. 337: "§ 32. The county courts shall also have jurisdiction: "First—To inquire, by the intervention of a grand jury, of all public offences committed or triable in their respective counties. And,

"Second. To try and determine all indictments found therein, for all public offences, except treason, misprision of treason, murder and manslaughter.

"§ 33. When an indictment is found in the county court for treason, misprision of treason, murder, or manslaughter, it shall be transmitted by the clerk to the district court sitting in the county, for trial, except when the indictment is found against a person holding the office of district judge, when it shall be transmitted to the district court of such other adjoining district as the county court may direct.

"§ 34. Indictments found in the county court shall also be transmitted to the district court sitting in the county, for trial, whenever the judge of the county court is disqualified from hearing or trying the same.

"§ 35. The county courts shall also have jurisdiction to hear and determine all cases, civil and criminal, appealed thereto, in the manner provided by law, from courts held by justices of the peace, recorders, and other inferior municipal courts in their respective counties.

"§ 36. The county courts and the judges thereof shall have power to issue writs of habeas corpus, on petition by, or on behalf of, any person in actual custody in their respective counties, and also all writs necessary or proper to the complete exercise of the powers conferred upon them by the constitution and by this and other statutes."

§ 796, Penal Code, provides for trial on indictments in San Francisco by the municipal criminal court.

SUB-DIVISION 1: 20 Cal. 573; 40 Cal. 398.

SUB-DIVISION 2: 19 Cal. 374; 28 Cal. 118.

SUB-DIVISION 4: 5 Cal. 43; 13 Cal. 135; 19 Cal. 551; 23 Cal. 144; 36 Cal. 639.
SUB-DIVISION 5: Mandamus: 15 Cal. 91; 26 Cal. 651.

§ 86. Its appellate jurisdiction extends to all cases arising in justices' or police courts.

9 Cal. 85; 32 Cal. 49; 35 Cal. 213; 26 Cal. 651; 37 Cal. 454; 39 Cal. 570.

§ 87. The proceedings of this court are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees, there is accorded like force, effect and legal presumptions, as to the records, orders, judgments and decrees of district courts.

See stat. 1863, 337; stat. 1865–6, 75.

§ 88. Fixes the terms of county courts; these as modified by laws of the nineteenth session, are given in the table preceding § 82.

§ 89. For the purpose of hearing and determining actions arising under the forcible entry and detainer act of this State, motions for new trials, and the entry of orders and judgments, this court is always open and in session.

See stat. 1863, 339; stat. 1865–6, 75.

§ 90. The terms of the county courts must be held at the county seats.

[Act of March 1, 1872, provides: "§ 1. Each of the regular terms of each county court shall continue until the next regular term unless the business of the court is sooner disposed of.]

CHAPTER VI.

OF THE PROBATE COURT.

SECTION 94. Court in each county.
95 Judges of.
96. Judge of, in San Francisco.
97. Jurisdiction of.

SECTION 98. Presumptions in favor of its judgments.
99. Terms of the court in the respective counties.
100. Terms, where held.

§ 94. There must be a probate court held in each of the counties.

§ 95. The county judge of each county, except in the city and county of San Francisco, is the judge of the probate court.

§ 96. In the city and county of San Francisco the probate court is held by a probate judge elected by the electors thereof, at the judicial elections, and who holds his office for the term of four years from the first day of January next succeeding his election.

§ 97. The probate court has jurisdiction—

1. To open and receive proof of last wills and testaments, and to admit them to *proof*.
2. To grant letters testamentary, of administration and of guardianship, and to revoke the same.
3. To appoint appraisers of estates of deceased persons.
4. To compel executors, administrators and guardians to render accounts.
5. To order the sale of property of estates, or belonging to minors.
6. To order the payment of debts due from estates.
7. To order and regulate all *distribution* of property or estates of deceased persons.
8. To compel the attendance of witnesses, and the production of title deeds, papers and other property of an estate, or of a minor.
9. To exercise the powers conferred by title xi, part iii, of this code.
10. To make such orders as may be necessary to the exercise of the powers conferred upon it.

Stat. 1863, 339, read "probate" instead of "proof," and "partition" instead of "distribution." See §§ 85, 167, and note to § 85.

38 Cal. 85; 4 Cal. 310, 362; 5 Cal. 58, 432, 437; 6 Cal. 621, 652, 666; 10 Cal. 110, 495; 15 Cal. 220; 18 Cal. 499, 478; 19 Cal. 188, 397; 20 Cal. 288, 623; 22

Cal. 266; 23 Cal. 415, 427; 24 Cal. 114, 123, 187; 28 Cal. 182, 502; 29 Cal. 20; 32 Cal. 46; 34 Cal. 632; 35 Cal. 509, 392; 39 Cal. 306.

See cases quoted under appropriate §§ begining with § 1294.

§ 98. The proceedings of this court are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees, there is accorded like force, effect and legal presumptions, as to the records, orders, judgment and decrees of district courts.

Stat. 1863, 339, reads: "The proceedings of the probate courts, within the jurisdiction conferred on them by law." See cases cited under § 97.

§ 99. Fixes the terms of probate courts; these as modified by laws of the nineteenth session are given in the table preceding § 82.

§ 100. The terms of the probate court must be held at the county seats.

[Act of March 1, 1872, provides that: "§ 2. Each of the regular terms of each probate court shall either with or without intermediate adjournment continue to the commencement of the next term.]

CHAPTER VII.

OF THE MUNICIPAL CRIMINAL COURT OF SAN FRANCISCO.

SECTION 104. This court continued.
105. Judge—election and term.
106. Jurisdiction.
107. Presumptions in favor of its judgments.
108. Terms of court.
109. Where held.
110. Officers and salaries.

§ 104. The court known as "The Municipal Criminal Court of San Francisco," is hereby continued, with the jurisdiction conferred by this chapter.

22 Cal. 473; 39 Cal. 517.

§ 105. The judge thereof is elected by the electors of the city and county of San Francisco, and holds his office for the term of four years from the first day of January next succeeding his election.

Stat. 1870, 528.

§ 106. Its jurisdiction extends to the trial of all indictments transmitted to it for trial by the county court of the city and county of San Francisco.

Stat. 1870, 529. § 796 of the penal code provides that all indictments found and triable in the county court of San Francisco must be transmitted to this court for trial.

§ 107. The proceedings of this court are construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, orders and judgments there is accorded like force, effect and legal presumptions, as to the records, orders, judgment and decrees of the district court.

Stat. 1870, 529.

§ 108. There must be six terms of this court held in each year, commencing on the first Monday of January, March, May, July, September and November.

Stat. 1870, 823.

§ 109. This court must be held at such place in the city and county of San Francisco as may be fixed by the board of supervisors.

§ 110. The provisions of sections eight, nine, fifteen and sixteen of an act to establish a municipal criminal court in the city and county of San Francisco, approved March 31st, 1870, are continued in force.

The sections named refer to the appointment etc., of officers of the court.

CHAPTER VIII.

OF JUSTICES' COURTS.

SECTION 112. Justices of the peace must hold.
113. Justices—election and term.
114. Civil jurisdiction.
115. Civil jurisdiction restricted.
116. Territorial extent of civil jurisdiction.
117. Criminal jurisdiction.
118. Courts, where held and when open.

§ 112. Every justice of the peace must hold a justice's court in the town or city in which he is elected.

Stat. 1863, 340.

§ 113. Justices of the peace are elected by the electors of their respective townships or cities, at the judicial elections, and hold their offices for two years from the first day of January next following their election.

Stat. 1863, 340.

§ 114. The civil jurisdiction of these courts within their respective townships or cities extends—

1. To an action arising on contract, for the recovery of money only, if the sum claimed, exclusive of interest, does not amount to three hundred dollars.

2. To an action for damages for injury to the person, or for taking or detaining personal property, or for injuring personal property, *or for an injury to real property where no issue is raised by the answer involving the plaintiff's title or possession of the same*, if the damages claimed do not amount to three hundred dollars.

3. To an action for a fine, penalty or forfeiture, not amounting to three hundred dollars, given by statute or the ordinance of an incorporated city or town.

4. To an action upon a bond or undertaking conditioned for the payment of money, not amounting to three hundred dollars, though the penalty exceed that sum; the judgment to be given for the sum actually due. When the payments are to be

made by instalments, an action may be brought for each instalment as it becomes due.

5. To an action to recover the possession of personal property, when the value of such property does not amount to three hundred dollars.

6. To take and enter judgment on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars.

The constitution, as amended in 1862, provides that "such powers shall not in any case trench upon the jurisdiction of the several courts of records."

Stat. 1850, 179, gave jurisdiction where amount was two hundred dollars or under.

Stat. 1863, 340, gave jurisdiction if the amount did not exceed three hundred dollars. The amendment (1863-4, '67) limited the jurisdiction to an amount *less than* three hundred dollars.

The variations between this section of the code and stat. 1863-4, '67 are: the second sub-division of stat. 1863-4, '67, read: "Or for injury to real or personal property if the damages claimed are less than three hundred dollars." The fifth sub-division (omitted in the code) read: "Of an action for the foreclosure of any mortgage or the enforcement of any lien on personal property, when the debt secured is less than three hundred dollars, exclusive of interest." The eighth contained, in addition to the text, the words "of an action to determine the right to a mining claim when the value of the claim is less than three hundred dollars," and the ninth sub-division added: "Of proceedings respecting vagrancy and disorderly persons."

Words in *italic* were not in previous statutes.

In general. 2 Cal. 144; 5 Cal. 445; 6 Cal. 19; 7 Cal. 244; 8 Cal. 76; 9 Cal. 85; 5 Cal. 296; 17 Cal. 67; 20 Cal. 282; 22 Cal. 169; 23 Cal. 86, 401; 24 Cal. 61; 28 Cal. 118; 29 Cal. 312; 33 Cal. 212, 318; 34 Cal. 321; 35 Cal. 269; 11 Cal. 280.

SUB-DIVISION 1: 5 Cal. 230, 331, 445; 6 Cal. 447; 7 Cal. 194; 8 Cal. 76; 22 Cal. 169, 465; 23 Cal. 61; 29 Cal. 307; 30 Cal. 545; 40 Cal. 629.

SUB-DIVISION 2: 38 Cal. 683; 39 Cal. 319.

SUB-DIVISION 6: 8 Cal. 76.

SUB-DIVISION 7: 6 Cal. 19.

§ 115. The jurisdiction conferred by the last section shall not extend, however—

1. To a civil action in which the title or possession of real property *is put in issue*.

2. Nor to an action or proceeding against ships, vessels or boats, ~~or against the owners or masters thereof~~, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state.

Stat. 1863, 340, reads: "necessarily comes in question," instead of "is put in issue."

§ 116. The civil jurisdiction of justices' courts, within an incorporated city, extends to the limits of such city, or township in which the city is situated. Mesne and final process of justices' courts may be issued to any part of the county in which they are held.

Stat. 1863, 340.

§ 117. These courts have jurisdiction of the following public offences, committed within the respective counties in which such courts are established:

1. Petit larceny.

2. Assault and battery, not charged to have been committed upon a public officer in the discharge of his duties.

3. Breaches of the peace, riots, affrays, committing a wilful injury to property, and all misdemeanors punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both such fine and imprisonment.

Stat. 1870, 579.

Stat. 1863, 341, added to the second clause the words, "or with intent to kill," and limited jurisdiction to fine of five hundred dollars, or imprisonment of six months.

Stat. 1869–'70, also contained the words "or with intent to kill," but extended the jurisdiction to fine and imprisonment, as in this section.

§ 118. These courts may be held at any place selected by the justice holding the same, in the township or city for which he is elected, and they are always open for the transaction of business.

Stat. 1863, 341.

CHAPTER IX.

OF POLICE COURTS.

SECTION 121. Organization, etc., provided for in political code.

§ 121. Police courts are established in incorporated cities and towns, and their organization, jurisdiction and powers provided for in the political code, part four.

34 Cal. 520.

CHAPTER X.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

ARTICLE I. PUBLICITY OF THEIR PROCEEDINGS.
II. INCIDENTAL POWERS AND DUTIES OF COURTS.
III. JUDICIAL DAYS.
IV. PROCEEDINGS WHEN JUDGES DO NOT ATTEND TO HOLD A COURT.
V. PARTICULAR PROVISIONS RESPECTING THE PLACES OF HOLDING THE COURTS OF JUSTICE.
VI. SEALS OF THE COURTS OF JUSTICE.

ARTICLE I.

PUBLICITY OF THE PROCEEDINGS OF THE COURTS OF JUSTICE.

SECTION 124. Sittings public.
125. Limitation on preceding section.

§ 124. The sittings of every court of justice are public, except as provided in the next section.

Stat. 1863, 342.

§ 125. In an action for divorce, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses and counsel.

Stat. 1863, 342.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

SECTION 128. Powers of court respecting the conduct of judicial proceedings.
129. Courts of record may make rules.
130. When rules take effect.

§ 128. Every court has power—

1. To preserve and enforce order in its immediate presence.

2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

3. To provide for the orderly conduct of proceedings before it or its officers.

4. To compel obedience to its judgments, orders and process, and to the orders of a judge out of court, in an action or proceeding pending therein.

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. To compel the attendance of persons, to testify, in an action or proceeding pending therein, in the cases and manner provided in this code.

7. To administer oaths in an action or proceeding pending

therein, and in all other cases where it may be necessary in the exercise of its powers and duties.

8. To amend and control its process and orders, so as to make them conformable to law and justice.

Sub-divisions 1, 2, 4 and the first clause of sub-division 5, substantially embrace the provisions of stat. 1863, 342, 365; the other sub-divisions taken from the New York code, embody various statutory provisions scattered through our laws, or well settled common law principles, applicable to the powers of judicial tribunals.

§ 129. Every court of record may make rules, not inconsistent with the laws of this State, for its own government and the government of its officers; but such rules must neither impose a tax or charge upon any legal proceeding nor give an allowance to any officer for services.

Stat. 1863, 335; 1869-70, 528.

§ 130. The rules adopted by the supreme court take effect sixty days, and those adopted by other courts, thirty days, after their publication.

Stat. 1863, 335.

ARTICLE III.

JUDICIAL DAYS.

SECTION 133. Days on which courts, etc., may be held
134. Days on which courts shall not be opened.
135. Court appointed, etc., for those days, deemed for next day.

§ 133. The courts of justice may be held, and judicial business may be transacted, on any day except as provided in the next section.

Stat. 1863, 342.

§ 134. No court can be opened, nor can any judicial business be transacted, on Sunday, on the first day of January, on the fourth of July, on Christmas or thanksgiving day, or on a

day on which the general or the judicial election is held, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict.

2. To receive a verdict or discharge a jury.

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

Stat. 1863, 343.

§ 135. If any of the days mentioned in the last section happen to be the day appointed for the holding of a court, or to which it is adjourned, it is deemed appointed for or adjourned to the next day.

ARTICLE IV.

PROCEEDINGS WHEN JUDGES DO NOT ATTEND TO HOLD A COURT.

SECTION 139. Adjournment of court for absence of judge.
140. The same.

§ 139. If no judge attend on the day appointed for holding the court, *or on the day to which it may have been adjourned*, before noon, the sheriff or clerk must adjourn the court until the next day, at ten o'clock; and if no judge attend on that day before noon, the sheriff or clerk must adjourn the court until the following day; and so on, from day to day, for one week.

Stat. 1863, 344. Words in *italic* were not in.

§ 140. If no judge attend for one week, the sheriff or clerk must adjourn the court for the term, *unless the judge, by written order, directs it to be adjourned to some day certain, fixed in such order, in which case they must so adjourn it.*

Stat. 1863, 344. Words in *italics* were not in.

19 Cal. 644; 24 Cal. 19.

ARTICLE V.

PARTICULAR PROVISIONS RESPECTING THE PLACES OF HOLDING THE COURTS OF JUSTICE.

SECTION 142. Judge may, in certain cases, change place of holding court.
143. Parties to appear at place appointed.
144. Rooms, etc., when judge may order.

§ 142. A judge authorized to hold or preside at a court appointed to be held in a county, city or town, may, by an order filed with the county clerk and published as he may prescribe, direct that the court be held or continued at any other place in the city, town or county than that appointed, when war, insurrection, pestilence or other public calamity, or the dangers thereof, or the destruction of the building appointed for holding the court, may render it necessary; and may in the same manner revoke the order, and, in his discretion, appoint another place in the same city, town or county, for holding the court.

Stat. 1863, 344.

§ 143. When the court is held at a place appointed as provided in the last section, every person held to appear at the court must appear at the place so appointed.

Stat. 1863, 344.

§ 144. If suitable rooms for holding the district courts, county courts and probate courts, and the chambers of the judges of such courts, be not provided in any county by the supervisors thereof, together with attendants, furniture, fuel, lights and stationery, sufficient for the transaction of business, the courts may direct the sheriff of such county to provide such rooms, attendants, furniture, fuel, lights and stationery, and the expenses thereof are a charge against such county.

Stat. 1863, 345.

[The act of 1863 was amended by act of January 16, 1872, by inserting the words "municipal criminal courts of the city and county of San Francisco."]

ARTICLE VI.

SEALS OF THE COURTS OF JUSTICE.

SECTION 147. What courts have seals.
148. Present seals to continue.
149. Seals for courts, not now provided with.
150. Private seal to be used, when.
151. Seals, by whom kept.
152. To what proceedings to be affixed.

§ 147. Each of the following courts has a seal:

1. The supreme court.
2. The district courts.
3. The county courts.
4. The probate courts.
5. The municipal criminal court of the city and county of San Francisco.
6. The police court of the city and county of San Francisco.

Stat. 1863, 344; 1869-'70, 528.

§ 148. The seal now used by the supreme court shall be the seal of that court; and where seals have been provided for the district, county and probate courts, municipal criminal and the police court of the city and county of San Francisco, such seals shall continue to be used as the seals of those courts.

Stat. 1863, 344; 1865-6, 65.

§ 149. The several district, county and probate courts, for which separate seals have not been heretofore provided, shal direct their respective clerks to procure seals, which shall be devised by the respective judges of such courts, and shall have the following inscriptions surrounding the same:

1. For the district courts: "District court, ——— county, California." (Inserting the name of the county.)
2. For the county courts: "County court, ——— county, California." (Inserting the name of the county.)
3. For the probate courts: "Probate court, ——— county, California." (Inserting the name of the county.)

Stat. 1863, 344.

§ 150. Until the seals devised, as provided in the last section, are procured, the clerk of each court may use his private seal, whenever a seal is required.

Stat. 1863, 344.

§ 151. The clerk of the court must keep the seal thereof.

§ 152. The seal of the court need not be affixed to any proceedings therein, except-

1. To a writ.

2. To the proof of a will, or the appointment of an executor, administrator or guardian.

3. To the authentication of a copy of a record or other proceeding of the court, or an officer thereof, for the purpose of evidence in another court.

Stat. 1863, 344.

First sub-division read to a "summons or writ," as to impression of seal on paper, see § 14.

TITLE II.

OF JUDICIAL OFFICERS.

CHAPTER 1. Of judicial officers in general.
II. Of the powers and duties of judges at chambers.
III. Particular disqualification of judges.
IV. Incidental powers and duties of judicial officers.
V. Miscellaneous provisions respecting courts and judicial officers.

CHAPTER I.

OF JUDICIAL OFFICERS IN GENERAL.

SECTION 156. Qualifications, as to residence, of justices of supreme court.
157. Qualifications, as to residence, of district judges.

SECTION 158. Places of residence of judges.
159. Residence in San Francisco construed.
160. District judges may hold courts in another district.
161. County and probate judges may hold court in another county.
162. County or probate judge who may hold term in another county, how designated.

§ 156. No person is eligible to the office of justice of the supreme court who has not been a citizen of the United States and a resident of this State, for two years next preceeding his election.

Stat. 1863, 333.

§ 157. No person is eligible to the office of district judge who has not been a citizen of the United States and a resident of this State for two years, and of the district one year, next preceding his election.

Stat. 1863, 335.

§ 158. Each district judge must reside in his district, and [illegible] county and probate judge must reside at the county seat respective county.

335.

[illegible]sidence in any part of the city and county of [illegible]isco is, within the meaning of the two preceding sections, a residence in the judicial districts embracing portions of that city.

Stat. 1863, 335.

§ 160. A district judge may hold a court in any *county* in this State, upon the request of the judge of the district in which such court is to be held; and when, by reason of sickness or absence from the State, or from any other cause, a court can not be held in *any county* in (a district) by the judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who may thereupon direct some other district judge to hold such court.

Stat. 1863, 336. Read "judicial district" instead of *county*, and "a district" instead of "*any county*." 1 Cal. 379.

§ 161. Any county or probate judge may hold terms, or portions of terms, of the county or probate court, and perform any or all of the duties of county or probate judge, in any other county of this State, as well as in that for which he was elected, in cases of sickness of the proper judge, or to hear, try, adjudicate and determine all causes and matters in which the county or probate judge of the proper county is interested, or has been employed as an attorney, or is disqualified by law from trying or adjudicating.

Stat. 1867-8, 145; 40 Cal. 648.

§ 162. When, from any of the causes mentioned in the preceding section, a term, or portion of a term, of the county or probate court cannot be held in a county by a county or probate judge thereof, the judge disqualified *may*, by consent of the parties to the actions or proceedings which such judge is disqualified from adjudicating, designate the county or probate judge of some other county to hold such term or portion of a term; and if the parties fail thus to consent, a certificate of the fact of such disqualification, or in the case of sickness of the judge, then of the fact of such sickness *must* be transmitted by the county clerk of such county to the governor, who must thereupon direct some county or probate judge of a neighboring county to hold such term or part of a term.

Stat. 1867-8, 145.

CHAPTER II.

OF THE POWERS AND DUTIES OF JUDGES AT CHAMBERS.

SECTION 165. Powers of justices of supreme court at chambers.
166. Powers of district and county judges at chambers.
167. Powers of probate judges at chambers.

§ 165. The justices of the supreme court, and each of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, except writs of review, mandate and prohibition, and may, in their discretion, hear applications to discharge such orders and writs.

See § 43.

§ 166. District and county judges, at chambers, may grant all orders and writs which are usually granted in the first instance upon ex parte applications, and may, at chambers, hear and dispose of such writs and of motions for new trials.

Stat. 1863, 336. "§ 25. The district judges shall, at all reasonable times, when not engaged in holding courts, transact such business at their chambers as may be done out of court. At chambers they may grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, in their discretion, also hear applications to discharge such orders and writs. At chambers they may grant writs of mandamus, certiorari, and quo warranto, and may hear and dispose of such writs, and also all motions for new trials; judgments, and orders of the district courts, may be entered in term and vacation" The same language, excepting writs of mandamus, certiorari and quo warranto, was applied to county courts in stat. 1863, 338.

10 Cal. 344; 17 Cal. 375; 27 Cal. 491; 30 Cal. 530, 561; 34 Cal. 331; 36 Cal. 24; 37 Cal. 15; 38 Cal. 439.

§ 167. The judges of the probate court, *may, at chambers,* appoint appraisers, receive inventories and accounts to be filed in the probate court; suspend the powers of executors, administrators or guardians, in the cases allowed by law; grant special letters of administration or guardianship; approve claims and bonds; and direct the issuance, from the probate courts, of all writs and process necessary in the exercise of their power.

Stat. 1863, 339, read "shall have power in vacation," instead of "may at chambers." 38 Cal. 439.

CHAPTER III.

PARTICULAR DISQUALIFICATION OF JUDGES.

SECTION 170. When disqualified.
171. Not to act as attorney in his own court.
172. Certain judges not to act as attorneys.
173. No judicial officer to have a partner.

§ 170. A judge cannot act as such in any of the following cases:

1. In an action or proceeding to which he is a party, or in which he is interested.

2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.

3. When he has been attorney or counsel for either party in the action or proceeding.

But this section does not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the cause to another county.

Stat. 1863, 343, did not contain "computed according to the rules of law." 12 Cal. 523.

§ 171. A judge cannot act as attorney or counsel in a court in which he is a judge, or in an action or proceeding removed therefrom to another court for *trial or* review, or in an action or proceeding from which an appeal may lie to his own court.

Stat. 1863, 343, did not contain "*trial or.*"

§ 172. A justice of the supreme court, or judge of the district court, cannot act as attorney or counsel in any court of this State, except in an action or proceeding to which he is a party on the record.

Stat. 1863, 343.

§ 173. No judge or other elective judicial officer, or district court commissioner, shall have a partner acting as attorney or counsel in any court of this State.

Stat. 1863, 343.

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

SECTION 176. General powers of judges out of court.
177. Powers of judicial officers as to conduct of proceedings before them.
178. Same.
179. Same.

§ 176. A judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from the court.

§ 177. Every judicial officer has power—

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of an official duty.

2. To compel obedience to his lawful orders, as provided in this code.

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code.

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary, in the exercise of his powers and duties.

See N. Y. C. C. P. §§ 184, 222.

§ 178. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt, in the cases provided in this code.

N. Y. C. C. P. § 185. See cases cited under § 1209.

§ 179. The justices of the supreme court, and the judges of the district and county courts, have power in any part of the State, and justices of the peace within their respective counties, and police judges and judges of municipal courts, within their respective cities or towns, to take and certify—

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument.

2. The acknowledgment of satisfaction of a judgment of any court.

3. An affidavit or deposition to be used in this State.

Stat. 1863, 345, did not contain first sub-division, and its third sub-division read: "an affidavit or deposition to be used in any court of justice in this State."

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

SECTION 182. Subsequent applications for orders, when prohibited.
183. Violation of last section.
184. No proceeding affected by a vacancy in office of judge, etc., etc.
185. Proceedings to be in the English language, except in certain counties.
186. Abbreviations and figures.
187. Means to be used to execute judicial powers in certain cases.

§ 182. If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any court commissioner or any other judge, except of a higher court; but nothing in this section applies to motions refused for any informality in the papers or proceedings necessary to obtain the order.

Stat. 1863, 345, transposed.

§ 183. A violation of the last section may be punished as a contempt, and an order made contrary thereto may be revoked

by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending.

Stat. 1863, 345.

§ 184. No proceeding in any court of justice, in an action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof.

Stat. 1863, 345, substantially the same.

§ 185. Every written proceeding in a court of justice in this State, or before a judicial officer, except in the counties of San Luis Obispo, Santa Barbara, Los Angeles and San Diego, must be in the English language, and in the excepted counties may be either in the English or Spanish language.

Stat. 1863, 345, transposed.

§ 186. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

See stat. 1863, 344.

§ 187. When jurisdiction is, by this code or by any other statute, conferred on a court or judicial officer, all the means *necessary* to carry it into effect are also given, and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code *or the statute*, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

From N. Y. C. C. P. § 243, the italicized words being added thereto.

TITLE III.

OF PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

CHAPTER I. OF JURORS.
II. OF COURT COMMISSIONERS.

CHAPTER I.

OF JURORS

ARTICLE I. JURORS IN GENERAL.
II. QUALIFICATIONS AND EXEMPTIONS OF JURORS.
III. MANNER OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.
IV. TIME AND MANNER OF DRAWING JURORS FOR COURTS OF RECORD.
V. MANNER OF SUMMONING JURORS FOR COURTS OF RECORD.
VI. MANNER OF SUMMONING JURORS FOR COURTS NOT OF RECORD.
VII. MANNER OF SUMMONING JURIES OF INQUEST.
VIII. OBEDIENCE TO SUMMONS, HOW ENFORCED.
IX. OF IMPANELLING A GRAND JURY.
X. OF IMPANELLING A TRIAL JURY IN COURTS OF RECORD.
XI. OF IMPANELLING A TRIAL JURY IN COURTS NOT OF RECORD.
XII. OF IMPANELLING JURIES OF INQUEST.

ARTICLE I.

JURORS IN GENERAL.

SECTION 190. Jury defined.
191. Different kinds of juries.
192. Grand jury defined.
193. Trial jury defined.
194. Number of a trial jury.
195. Jury of inquest defined

§ 190. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offence, or to try a question of fact.

§ 191. Juries are of three kinds:

1. Grand juries.
2. Trial juries.
3. Juries of inquest.

§ 192. A grand jury is a body of men, not less than thirteen nor more than fifteen in number, returned at stated periods from citizens of the county, before a court of competent jurisdiction, and sworn to inquire of public offences committed or triable within the county.

§ 193. A trial jury is a body of men, returned from the citizens of a particular district, before a court or officer of competent jurisdiction, and sworn to try and determine, by a unanimous verdict, a question of fact.

§§ 190–193 are taken from N. Y. C. C. P. §§ 244–247.

§ 194. A trial jury consists of twelve men, unless the parties to the action or proceeding agree upon a less number.

18 Cal. 408.

§ 195. A jury of inquest is a body of men, summoned from the citizens of a particular district, before the sheriff, coroner or other ministerial officer, to inquire of particular facts.

N. Y. C. C. P. § 248.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

SECTION 198. Who are competent to act as jurors.
199. Who are not competent to act as jurors.
200. Who are exempt.
201. Who may be excused.

§ 198. A person is competent to act as a juror if he be—

1. A citizen of the United States, an elector of the county, and a resident of the township at least three months before being selected and returned.

2. In possession of his natural faculties *and not decrepit.*

3. Possessed of sufficient knowledge of the language in which the proceedings of the courts are had.

4. Assessed on the last assessment roll of his county, on property belonging to him.

See stats. 1863, 630; 1863-4, 462, 524.
SUB-DIVISION 1: 3 Cal. 107; 4 Cal. 175; 6 Cal. 405; 16 Cal. 78; 17 Cal. 220.
SUB-DIVISION 3: 32 Cal. 40.
SUB-DIVISION 4: 34 Cal. 672.

§ 199. A person is not competent to act as a juror—

1. Who does not possess the qualifications prescribed by the preceding section.

2. Who has been convicted of a felony or misdemeanor, involving moral turpitude.

By stat. 1863, and 1863-4, gamblers were expressly disqualified.

§ 200. A person is exempt from liability to act as a juror, if he be—

1. A judicial, civil or military officer of the United States or of the State of California.

2. A person holding a county office.

3. An attorney and counsellor at law.

4. A minister of the gospel or a priest of any denomination.

5. A teacher in a college, academy or school.

6. A practicing physician.

7. An officer, keeper or attendant of an almshouse, hospital, asylum or other charitable institution.

8. Engaged in the performance of duty as officer or attendant of a county jail or the state prison.

9. Employed on board of a vessel navigating the waters of this State.

10. An express agent, mail carrier, telegraph operator or keeper of a public ferry or toll gate.

11. An active member of the fire department of any city, town or village in this State, or an exempt member by reason of five years' active service.

12. A superintendent, engineer or conductor on a railroad.

The first ten sub-divsions are from stat. 1863, 630, and 1863-4, 525; the 11th from stat. 1853, 59, and 1865-6, 30; the 12th is new, and similar to that of N. Y. C. C. P. § 258.

§ 201. A juror cannot be excused by the court for slight or trivial cause, or for hardship, or inconvenience to his business, but only when material injury or destruction to his property, or that of the public entrusted to him, is threatened, or when

his own health, or the sickness or death of a member of his family, requires his absence.

Stat. 1863, 634, § 13.

ARTICLE III.

MANNER OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

SECTION 204. List of persons to serve as jurors to be made by supervisors.
205. How selection shall be made.
206. List to contain one name for every hundred inhabitants.
207. Person who served as juror during preceding year not to be selected.
208. List to be p aced with clerk.
209. Duty of clerk on receiving lists.
210. Regular jurors to serve one year.

§ 204. The board of supervisors of each county must, at their first regular meeting in each year, or at any other meeting if neglected at the first, make a list of persons to serve as jurors in the courts of record for the ensuing year.

§ 205. They must proceed to select and list from those assessed on the assessment roll of the previous year, suitable persons, competent to serve as jurors; and, in making such selection, they must take the names of such only as are not exempt from serving, who are in possession of their natural faculties, and not infirm or decrepit, of fair character, of approved integrity, and of sound judgment.

§ 206. Such lists must contain not less than one for every hundred inhabitants of each township or ward, having regard to the population of the county, so that the whole number of jurors selected in the county shall amount, at least, to one hundred, and not exceed one thousand.

§ 207. In making such selection, the board must not select any of the same persons who actually served as jurors at any term of court during the preceding year; and if such persons are drawn and returned to serve as trial jurors, it will be the duty of the court to strike the names of such persons from the list of jurors, and direct the sheriff to fill up the list from among the neighboring citizens competent to serve as jurors; and in counties having ten thousand or more inhabitants, it shall be a good cause of challenge that any trial juror, whether on the regular panel or taken from among the bystanders, has served as a trial juror at any time within the year next preceding the making of the list of persons to serve as jurors as hereinbefore provided.

§ 208. Certified lists of the persons selected to serve as jurors must at once be placed in the possession of the county clerk.

§ 209. On receiving such lists, the clerk must file the same in his office, and write down the names contained therein on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon, and deposit them in a box to be called the "jury box."

§ 210. The persons whose names are so returned are known as regular jurors, and must serve for one year and until other persons are selected and returned.

ARTICLE IV.

TIME AND MANNER OF DRAWING JURORS FOR COURTS OF RECORD.

SECTION 214. Jury to be drawn upon the order of the judge.
215. Clerk to notify county judge and sheriff of time of drawing.
216. Sheriff and judge to witness drawing.
217. Drawing, when to be adjourned.

SECTION 218. Shall proceed, when.
219. Drawing, how conducted.
220. After adjournment of court, disposition to be made of ballots.
221. Copy of list to be furnished by clerk.

§ 214. Not less than ten nor more than thirty days before the commencement of any term of court, the judge thereof, if a jury will be required therefor, must make and file with the county clerk an order that one be drawn. The number to be drawn must be fixed in the order; if to form a grand jury, it must be twenty-four, and if a trial jury, such number as the judge may direct.

4 Cal. 225; 10 Cal. 59.

§ 215. At least one day before the drawing, the clerk must notify the sheriff and county judge of the time when such drawing will take place, which time must not be more than three days after the receipt by him of the order for such drawing.

§ 216. At the time so appointed, the sheriff, in person or by deputy, and the county judge, must attend at the county clerk's office, to witness such drawing, and if they do so, the clerk must, in their presence, proceed to draw the jurors.

§ 217. If the officers so notified do not appear, the clerk must adjourn the drawing until the next day, and, by written notice, require two electors of the county to attend such drawing on the adjourned day.

§ 218. If, at the adjourned day, the sheriff, county judge and electors, or any two of such persons, appear, the clerk must in their presence proceed to draw the jurors.

§ 219. The clerk must conduct such drawing as follows:

1. He must shake the box containing the names of jurors returned to him, from which jurors are required to be drawn, so as to mix the slips of paper upon which such names were written, as much as possible.

2. He must then publicly draw out of the box as many such slips of paper as are ordered by the judge.

3. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name contained on every slip of paper so drawn, before any other slip is drawn.

4. If, after drawing the whole number required, the name of any person has been drawn who is dead or insane, or who has permanently removed from the county, to the knowledge of the clerk or any other attending officer, an entry of such fact must be made in the minute of the drawing, and the slip of paper containing such name must be destroyed.

5. Another name must then be drawn, in place of that contained on the slip of paper so destroyed, which must, in like manner, be entered in the minutes of the drawing.

6. The same proceedings must be had as often as may be necessary, until the whole number of jurors [required are drawn.

7. The minute of the drawing must then be signed by the clerk and the attending officers or persons, and filed in the clerk's office.

8. Separate lists of the names of the persons so drawn for trial jurors, and of those drawn for grand jurors, with their places of residence, and specifying for what court they were drawn, must be made and certified by the clerk and the attending officers or persons, and delivered to the sheriff of the county.

§ 220. After the adjournment of any court at which jurors have been returned, as herein provided, the clerk must inclose the ballots containing the names of those who attended and served as jurors, in an envelop, under seal, and the ballots of those who did not attend and serve must be returned to the jury box. The ballots sealed in envelops must not be returned to the jury box until all the ballots therein have been exhausted.

§ 221. The county clerk must furnish any person applying therefor, and paying the fees allowed by law for the same, a copy of the list of jurors drawn to attend any court.

ARTICLE V.

MANNER OF SUMMONING JURORS FOR COURTS OF RECORD.

SECTION 225. Sheriff to summon jurors, how.
226. Court may order jury drawn, when.
227. When jury may be completed from bystanders.

§ 225. As soon as he receives the list of jurors drawn, the sheriff must summon the persons named therein to attend, by giving personal notice to each, or by leaving a written notice at his place of residence, with some person of proper age, and must return the list to the court at the opening thereof, specifying the names of those who were summoned and the manner in which each person was notified.

9 Cal. 529.

§ 226. Whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be forthwith drawn and summoned to attend such court; or it may, by an order entered on its minutes, direct the sheriff of the county forthwith to summon so many good and lawful men of his county to serve as jurors as the case may require. And in either case such jurors must be summoned in the manner provided by the preceding section.

§ 227. When there are not competent jurors enough present to form a panel, the court may direct the sheriff or other proper officer to summon a sufficient number of persons, having the qualification of jurors, to complete the panel, from the body of the county and not from the bystanders, and the sheriff must summon the number so ordered, accordingly, and return the names to the court.

4 Cal. 218.

ARTICLE VI.

MANNER OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

SECTION 230. Jurors for police and justices'-courts, by whom summoned.
231. How summoned.
232. Officer's return.

§ 230. When jurors are required in any police or justices' court, they must, upon the order of the judge or justice thereof, be summoned by the sheriff, marshal, policeman or constable of the jurisdiction.

§ 231. Such jurors must be summoned from the persons resident of the city or township, competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

§ 232. The officer summoning such jurors must, at the time fixed in the order for their appearance, return it with a list of the persons summoned indorsed thereon.

ARTICLE VII.

MANNER OF SUMMONING JURIES OF INQUEST.

SECTION 235. How summoned.

§ 235. Juries of inquest must be summoned by the officer before whom the proceedings are had, or any sheriff, policeman or constable, from the persons resident of the county, competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

SECTION 238. Obedience to summons, how enforced.

§ 238. Any juror summoned, who wilfully, and without reasonable excuse, fails to attend, may be attached and compelled to attend, and the court may also impose a fine not exceeding one hundred dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until, upon an order to show cause, an opportunity has been offered the juror to be heard.

Stat. 1863, 630.

ARTICLE IX.

OF IMPANELLING A GRAND JURY.

SECTION 241. Grand jury, when to be impanelled.
242. Grand jury, how constituted.
243. Jury to be impanelled as prescribed in penal code.

§ 241. At the opening of each regular term of the county court (unless otherwise directed by the judge), and as often thereafter as to the judge may seem proper, a grand jury may be impanelled.

§ 242. When, of the jurors summoned, not less than thirteen nor more than fifteen attend, they shall constitute the grand jury. If more than fifteen attend, the clerk must call over the list summoned, and the fifteen first answering shall constitute the grand jury. If less than thirteen attend, the panel may be filled to fifteen as provided in section two hundred and twenty-six.

Stat. 1863, 634, § 11.

§ 243. Thereafter such proceedings shall be had in impanelling the grand jury as are prescribed in part two of the penal code.

ARTICLE X.

OF IMPANELLING TRIAL JURY IN COURTS OF RECORD.

SECTION 246. Clerk to call list of jurors summoned, etc.
247. Jury to be impanelled as prescribed in part two.

§ 246. At the opening of court, on the day trial jurors have been summoned to appear, the clerk must call the names of those summoned, and the court may then hear the excuses of jurors summoned. The clerk must then write the names of the jurors present and not excused, upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and then, in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed until ordered by the court to be opened.

§ 247. When thereafter an action is called for trial by the court, such proceedings shall be had in impanelling the trial jury as are prescribed in part two of this code.

See §§ 600, 604.

ARTICLE XI.

OF IMPANELLING A TRIAL JURY IN COURTS NOT OF RECORD.

SECTION 250. Proceedings in forming jury in courts not of record.
251. How impanelled.

§ 250. At the time appointed for a jury trial, in police or justices' courts, the list of jurors summoned must be called, and the names of those attending must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

§ 251. Thereafter, if the action is a criminal one, the jury must be impanelled as provided in the penal code. If a civil one, as provided in part two of this code.

ARTICLE XII.

OF IMPANELLING JURIES OF INQUEST

SECTION 254. Mode and manner of impanelling.

§ 254. The mode and manner of impanelling juries of inquest are provided for in the provisions of the different codes relating to such inquests.

The commissioners report the preceding chapter as a substitute for existing statutes on the same subject. We have now a jury law applicable to thirty-three counties; another, entirely different in its provisions, applicable to sixteen counties; and still another, differing from both, applicable to San Francisco alone (Stat. 1861, 573; 1863, 630; 1864, 524), and various statutes of local application.

CHAPTER II.

OF COURT COMMISSIONERS.

SECTION 258. Court commissioners, how appointed.
259. Powers of court commissioners.

§ 258. The district courts may appoint, for each county of their respective districts, a commissioner, to be designated as "court commissioner" of the county. If portions of a single county are assigned to different districts, then a commissioner may be appointed to reside in each portion of the county thus assigned.

Stat. 1862, 338.

§ 259. Every such commissioner has power—

1. To hear and determine ex parte motions for orders and writs (except orders or writs of injunction) in the district and county courts of the county for which he is appointed.

2. To take proof and report his conclusions thereon, as to any matter of fact, other than an issue of fact raised in the pleadings, upon which information is required by the court; but any party to the proceedings may except to such report within four days after the same has been filed, and may argue his exceptions before the court, on giving notice of motion for that purpose.

3. To take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such district and county courts, and to examine the sureties thereon when an exception has been taken to their sufficiency, and to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this State, or in any matter or proceeding whatever.

The words "written notice that" have been inserted; in other respects this section is the same as stat. 1863–4, 229, which added:

"Fourth—Any matter or proceeding that may have been referred to any such commissioner, other than such as are herein specified, shall by the operation and effect of this act be returned to the proper court, and all power and authority of the commissioner over the same shall cease and terminate.

"Fifth—No power shall be exercised by any such commissioner except as herein provided."

The stat. 186 -4, did not apply to the first, fifth, sixth, seventh, eleventh, and thirteenth districts. The previous stat. 1863, 338, applicable to the last named districts, is as follows:

"§ 40. The court commissioners shall have power—

"First—To hear and determine ex parte motions for orders and writs in actions and proceedings pending in the district and county courts of their respective counties.

"Second—To hear and determine such contested motions in such actions and proceedings as may be referred to them by said courts for determination.

"Third—To hear and determine all issues of law or fact in such actions and proceedings as may be referred by order of said courts, when no other person is agreed upon by the parties as referee.

"Fourth—To take proof upon and determine as to any matter of fact upon which information is required by the said courts.

"Fifth—To take affidavits and depositions, and to take and approve of bonds and undertakings, whenever the same may be required in such actions and proceedings, and to examine into the qualifications of the sureties thereon when an exception has been taken to their sufficiency."

28 Cal. 497; 37 Cal. 338.

TITLE IV.

OF THE MINISTERIAL OFFICERS OF THE COURTS OF JUSTICE.

CHAPTER I. OF MINISTERIAL OFFICERS GENERALLY.
II. OF THE SECRETARY AND BAILIFF OF THE SUPREME COURT.
III. OF PHONOGRAPHIC REPORTERS.

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

SECTION 262. Election, powers and duties, where prescribed.

§ 262. The modes of election, powers and duties of the attorney-general, clerk of the supreme court, reporter of the supreme court, clerks, sheriffs and coroners, are prescribed in the political and penal codes.

CHAPTER II.

OF THE SECRETARY AND BAILIFF OF THE SUPREME COURT.

SECTION 265. Justices may appoint.
266. Tenure and duties.

§ 265. The justices of the supreme court may appoint a secretary and bailiff.

§ 266. The secretary and bailiff hold their offices at the pleasure of the justices, and must perform such duties as may be required of them by the court or any justice thereof.

CHAPTER III.

OF PHONOGRAPHIC REPORTERS.

SECTION 269. How appointed, and duty.
270. Report prima facie correct.
271. Compensation.

§ 269. The judge of each judicial district, and each county judge, may appoint a competent short hand reporter, to hold office during the pleasure of the judge, and who must, at the request of either party, or in the discretion of the court, in a civil action or proceeding, or criminal action or proceeding, on the order of the court, *the district attorney, or the counsel for the defendant*, take down in short hand all the testimony, the rulings of the court, the exceptions taken, *and oral instructions given*, and must, within five days, or such reasonable time after the trial of such case as the court may designate, write out the same in plain, legible, long hand writing, verify and file it, together with the original short hand writing,

with the clerk of the court in which the case was tried. *The reporter of the county court of the city and county of San*

[RECONSTRUCTED.]

§ 270. The report of the official reporter, when appointed and acting in accordance with the provisions of §§ 272 and 273 of this Code, and not otherwise, written out in long hand-writing, and certified as being a correct transcript of the testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings. (In effect May 29, 1874.)

[illegible] He shall receive, as compensation for his services, not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per folio for transcription, to be paid by

§ 271. The official reporter shall receive as compensation for his services *in civil proceedings*, not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per hundred words for transcription. *The short-hand notes so taken, shall immediately after the cause is submitted be filed with the clerk; but for the purpose of writing out said notes, the reporter may withdraw the same for a reasonable time. The reporter's fees for taking notes in civil cases*, shall be paid by the party in whose favor judgment is rendered, and shall be taxed up by the clerk of the court as costs against the party against whom judgment is rendered. In case of the failure of a jury to agree, the plaintiff must pay the reporter's fees, *for per diem, and for transcription ordered by plaintiff*, which have accrued up to the time *of the discharge of the jury*. In cases where a transcript has been ordered by the court, the expense thereof must be paid equally by the respective parties to the action, or either of them, in the discretion of the court; and no verdict or judgment can be entered up, except the court shall otherwise order, until the reporter's fees are paid, or a sum equivalent thereto deposited with the clerk of the court. In no case shall a transcript be paid for, unless† ordered by either the plaintiff or defendant, or by the court, nor shall the reporter be required, in any civil case, to transcribe his notes, until the compensation therefor be tendered him, or deposited in court for that purpose. *The party ordering the reporter to transcribe any portion of the testimony or proceedings, shall pay the fees of the reporter therefor.* In criminal cases, when the testimony has been taken down upon the order of the court, the compensation of the reporter must be fixed by the court, and paid out of the treasury of the county in which the case is tried, upon the order of the court. (In effect May 29, 1874.)

CHAPTER II.

OF THE SECRETARY . . .

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§ 366. The secretary and bailiff hold their offices at the pleasure of the justices, and must perform . . .

with the clerk of the court in which the case was tried. *The reporter of the county court of the city and county of San Francisco is ex officio reporter of the probate and municipal courts of such city and county.*

Stat. 1865-6, 222, words in *italics* are new.

§ 270. His report, written out in long hand writing, is prima facie a correct statement of the evidence and proceedings.

Stat. 1865-6, 222.

§ 271. He shall receive, as compensation for his services, not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per folio for transcription, to be paid by the party in whose favor judgment is rendered, and be taxed up by the clerk of the court as costs against the party against whom judgment is rendered. *In case of failure of a jury to agree the plaintiff must pay the reporter's fees accrued to that time.* In cases where a transcript may be required by the court, the expense thereof must be paid equally by the respective parties to the action, or either of them, in the discretion of the court; and no verdict or judgment can be entered up, except the court shall otherwise order, until the reporter's fees are paid, or a sum equivalent thereto deposited with the clerk of the court. In no case shall the transcript be paid for unless specially ordered by either plaintiff or defendant, or by the court; nor shall the reporter be required, in any civil case, to transcribe his notes until the compensation per folio therefor be tendered to him or deposited in court for that purpose. In criminal cases, when the testimony has been taken down by order of the court, the compensation of the reporter must be fixed by the court and paid out of the treasury of the county in which the case is tried, upon the order of the court.

Stat. 1867-8, 455, did not contain words in *italics*, previous stat. 1865-6, 222.

TITLE V.

OF PERSONS SPECIALLY INVESTED WITH MINISTERIAL POWERS RELATING TO COURTS OF JUSTICE.

CHAPTER I. ATTORNEYS AND COUNSELLORS AT LAW.
II. OF OTHER PERSONS INVESTED WITH SUCH POWERS.

CHAPTER I.

ATTORNEYS AND COUNSELLORS AT LAW.

SECTION 275. Who may be admitted as attorneys.
276. Qualifications.
277. Certificate of admission. License.
278. Oath.
279. Attorneys of other states.
280. Roll of attorneys.
281. Penalty for practicing without license.
282. General duties.
283. Authority of attorney.
284. Change of attorney.
285. Notice of change.
286. Death or removal of attorney.
287. Removal and suspension.
288. Conviction of felony. Moral turpitude.
289. Proceedings for removal or suspension.
290. Accusation.
291. Verification.
292. Citation to answer.
293. Appearance.
294. How to answer.
295. Demurrer.
296. Answer.
297. Trial.
298. Reference
299. Judgment.

§ 272. (N. S.) No person shall be appointed to, or be retained in the position of official reporter of any court in this state, without being first examined as to his competency by at least three members of the bar practicing in said court, such members to be designated by the judge of said court. The committee so selected shall, upon the request of the judge of said court, examine any person as to his qualifications whom said judge may wish to appoint or retain as official reporter, and no person shall be appointed to, or retained in such position, upon whose qualifications said committee shall not have reported favorably. The test of competency before such committee shall be as follows: The party examined must write, in the presence of said committee, at the rate of at least one hundred and forty words per minute for five consecutive minutes, upon matter not previously written by him, and transcribe the same into long-hand writing with accuracy. If he pass said test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed in the records of the court. (In effect May 29, 1874.)

§ 273. (N. S.) The official reporter of any district court must attend to the duties of his office in person, except when excused for a good and sufficient reason by order of the court, which order shall be entered upon the minutes of the court.

§ 274. (N. S.) The official reporter of any court, or official reporter pro tem., must, before entering on the duties of his office, take and subscribe the following oath: "I do swear (or affirm) that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of the office of official reporter (or official reporter pro tem.) of the —— court, according to the best of my ability." (Approved March 30, 1874.)

§ 275. Any white male citizen, or white male person *resident of this state*, who has bona fide declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counsellor in all courts of this state.

Stat. 1861, 40. Words in *italics* are new. Stat. 1850 read: "Any white male citizen of the age," &c.

Generally: 3 Cal. 108; 8 Cal. 570; 15 Cal. 387; 17 Cal. 61; 20 Cal. 427; 22 Cal. 293; 24 Cal. 241; 31 Cal. 11; 33 Cal. 425; 35 Cal. 534.

Authority presumed: 13 Cal. 191; 17 Cal. 431; 21 Cal. 51; 23 Cal. 636; 30 Cal. 192; 35 Cal. 531; 39 Cal. 683.

Compensation: 1 Cal. 331; 2 Cal. 507; 3 Cal. 108; 5 Cal. 435; 6 Cal. 56; 9 Cal. 306; 13 Cal. 640; 17 Cal. 61.

Actions against: 3 Cal. 108; 13 Cal. 203; 22 Cal. 200; 33 Cal. 425.

Notice to: 31 Cal. 128, 160.

§ 276. Every applicant for admission as attorney and counsellor must produce satisfactory testimonials of good moral character, and undergo a strict examination in open court, as to his qualifications, by the justices of the supreme court. Stat. 1861, 40, also provided: "§ 2. . . . If, upon examination, he is found qualified, the court must admit him as attorney and counsellor in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license.

provided, that the several county and district courts of this state may admit applicants to practice as attorneys and counselors in their respective courts.

Stat. 1861, 40, also provided: "§ 4. The district and county courts of this state are authorized to admit, as attorney and counsellor in their respective courts, any white male citizen, or white male person who has bona fide declared his intention to become a citizen, of the age of twenty-one years, and of good moral character, who possesses the requisite qualifications, on similar testimonials and like examinations as are required by the preceding section for admission by the supreme court, and may direct their clerks to give a certificate of such admission, which certificate shall be a license to practice in such courts."

§ 278. Every person, on his admission, must take an oath to support the constitution of the United States and of this State, and to discharge the duties of attorney and counsellor

to the best of his knowledge and ability. A certificate of such oath must be indorsed on the license.

Stat. 1851, 49.

§ 279. Every white male citizen of the United States, who has been admitted to practice law in the highest court of a sister State may be admitted to practice in the courts of this State, upon the production of his license and satisfactory evidence of good moral character; but the court may examine the applicant as to his qualifications.

Stat. 1859, 49.

Stat. 1851, 49, read: "§ 6. The examination may be dispensed with, in the case of a person who has been admitted attorney and counsellor in the highest courts of a sister State; his affidavit of such admission, or his license showing the same, shall be deemed sufficient to entitle him to admission."

Stat. 1869–70, 578: "Every white male citizen of the United States, who has been admitted to practice law in the highest courts of a sister State, or in the supreme court of the United States, or in the supreme court of the District of Columbia, may be admitted to practice in the courts of this State, upon the production of his license and satisfactory evidence of his good moral character; but the court may examine the applicant as to his qualifications."

An Act to exclude traitors and alien enemies from courts of justice of, 1863, 566, was repealed. Stat. 1867–8, 8.

§ 280. Each clerk must keep a roll of attorneys and counsellors *admitted to practice by* the court of which he is a clerk, *which roll must be signed by the person admitted before he receives his license.*

§ 281. If any person shall practice law in any court, except a justice's or *police* court, without having received a license as attorney and counsellor, he is guilty of a contempt of court.

Stat. 1851, 49, contained the words, "and punished as in other cases of contempt."

§ 282. It is the duty of an attorney and counsellor—

1. To support the constitution and laws of the United States and of this State.

2. To maintain the respect due to the courts of justice and judicial officers.

3. To counsel or maintain such actions, proceedings or de-

fences only as appear to him legal or just, except the defence of a person charged with a public offence.

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by an artifice or false statement of fact or law.

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

7. Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest.

8. Never to reject, for any consideration personal to himself, the cause of the defenceless or the oppressed.

N. Y. C. C. P., § 511.

SUB-DIVISION 5: 15 Cal. 387; 23 Cal. 331: 29 Cal. 47; 33 Cal. 425; 34 Cal. 610; 36 Cal. 489.

§ 283. An attorney and counsellor has authority—

1. To bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise.

2. To receive money claimed by his client, in an action or proceeding, during the pendency thereof, or after judgment, *unless a revocation of his authority is filed*, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Same as stat. 1851, 49, except that the § omits within one year, and inserts words in *italics*.

SUB-DIVISION 1: 1 Cal. 213; 2 Cal. 92; 3 Cal. 185; 13 Cal. 191; 29 Cal. 147; 35 Cal. 467; 40 Cal. 284.

§ 284. The attorney in an action or special proceeding may be changed at any time before judgment or final determination, as follows:

1. Upon his own consent, filed with the clerk or entered upon the minutes.

2. Upon the order of the court or judge thereof, upon the application of the client.

Stat. 1851, 49, N. Y. C. C. P. § 517.
16 Cal. 436; 33 Cal. 208.

§ 285. When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he must recognize the former attorney.

Stat. 1851, 49, N. Y. C. C. P. § 518.
6 Cal. 55.

§ 286. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

Stat. 1851, 49, N. Y. C. C. P. § 519.

§ 287. An attorney and counsellor may be removed or suspended by the supreme court, and by the district courts of the State, for either of the following causes, arising after his admission to practise:

1. His conviction of a felony, or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.

2. Wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, and any violation of the oath taken by him or of his duties as such attorney and counsellor.

3. *Corruptly and without authority appearing as attorney for a party to an action or proceeding.*

In all cases where an attorney is removed or suspended by a district court, he may appeal to the supreme court, and the judgment or order of the district court is subject, on such appeal, to review, as in civil actions.

Stat. 1859, 69. Third sub-division is new.
1 Cal. 143, 190; 20 Cal. 427.

§ 288. In case of the conviction of an attorney or counsellor of a felony, or misdemeanor involving moral turpitude,

the clerk of the court in which a conviction is had must, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction.

§ 289. The proceedings to remove or suspend an attorney and counsellor, under the first sub-division of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction; the proceedings under the second sub-division of section two hundred and eighty-seven may be taken by the court for matters within its knowledge, or may be taken upon the information of another.

§ 290. If the proceedings are upon the information of another, the accusation must be in writing.

§ 291. The accusation must state the matters charged, and be verified by the oath of some person, to the effect that the charges therein contained are true.

§ 292. After receiving the accusation, the court must, if in its opinion the case require it, make an order requiring the accused to appear and answer the accusation, at a specified time in the same or subsequent term, and must cause a copy of the order and of the accusation to be served upon the accused within a prescribed time before the day appointed in the order.

§ 293. The accused must appear at the time appointed in the order, and answer the accusation, unless for sufficient cause the court assign another day for that purpose; if he do not appear, the court may proceed and determine the accusation in his absence

§ 294. The accused may answer to the accusation, either by objecting to its sufficiency or denying it.

§ 295. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes.

§ 296. If an objection to the sufficiency of the accusation is not sustained, the accused must answer forthwith.

§ 297. If the accused plead guilty, or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the matters charged, the court must, at such time as it may appoint, proceed to try the accusation.

§ 298. The court may, in its discretion, order a reference to a committee to take depositions in the matter.

§ 299. Upon conviction, in cases arising under the first sub-division of section two hundred and eighty-seven, the judgment of the court must be that the name of the party be stricken from the roll of attorneys and counsellors of the court, and he be precluded from practising as such attorney or counsellor in all the courts of this State; and, upon conviction in cases under the second sub-division of section two hundred and eighty-seven, the judgment of the court may be according to the gravity of the offence charged—deprivation of the right to practise as attorney or counsellor in the courts of this State, permanently or for a limited period.

Stat. 1851, 51.

§§ 283–299, *a.e*, excepting the slight variation noted, taken from stat. 1851, 49–51,

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CHAPTER II.

OF OTHER PERSONS INVESTED WITH SUCH POWERS.

SECTION 304. Receivers and guardians.

§ 304. The appointment, powers and duties of receivers and guardians, are provided for and prescribed in parts two and three of this code

PART II.

OF CIVIL ACTIONS.

TITLE I. FORM OF CIVIL ACTIONS. §§ 307–309.
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TITLE I.

OF THE FORM OF CIVIL ACTIONS.

SECTION 307. One form of civil action only.
308. Parties to actions, how designated.
309. Special issues not made by pleadings, how tried.

§ 307. (§ 1.) There is in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs.

1 Cal. 167; 2 Cal. 463; 3 Cal. 196, 458; 4 Cal. 6; 12 Cal. 143; 16 Cal. 221; 17 Cal. 487; 18 Cal. 126; 19 Cal. 476; 21 Cal. 129; 24 Cal. 458; 26 Cal. 11; 36 Cal. 519.

Not applicable to probate proceedings (15 Cal. 220) nor special cases (5 Cal. 43).

§ 308. (§ 2.) In such action the party complaining is known as the plaintiff, and the adverse party, as the defendant.

§ 309. (§ 3.) A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

TITLE II.

OF THE TIME OF COMMENCING ACTIONS.

CHAPTER I. The time of commencing actions in general. § 312.
II. The time of commencing actions for the recovery of real property. §§ 315–328.
III. The time of commencing actions other than for the recovery of real property. §§ 335–345.
IV. General provisions as to the time of commencing actions. §§ 350–362.

CHAPTER I.

THE TIME OF COMMENCING ACTIONS IN GENERAL.

SECTION 312. Commencement of civil actions.

§ 312. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

Stat. 1850, 343.

Statute of limitations in general: 6 Cal. 381, 430; 7 Cal. 1, 424; 8 Cal. 449; 10 Cal. 305; 16 Cal. 93; 18 Cal. 492; 21 Cal. 495; 27 Cal. 145, 278; 29 Cal. 19. Lyman vs. Walker, 35 Cal. 634; 36 Cal. 180.

When cause of action accrues: 6 Cal. 53, 430; 7 Cal. 247; 13 Cal. 540; 14 Cal. 134; 16 Cal. 173; 19 Cal. 85; 27 Cal. 57, 119, 274, 376; 20 Cal. 225; 22 Cal. 556; 24 Cal. 114; 25 Cal. 593; 29 Cal. 563; 34 Cal. 254, 149; 35 Cal. 634; 38 Cal. 24, 242, 335, 407; 39 Cal. 369; 40 Cal. 547.

The statute can not be availed of as a defence, unless pleaded: 2 Cal. 409; 19 Cal. 476; 23 Cal. 16; 25 Cal. 82; 27 Cal. 360; 28 Cal. 105; 30 Cal. 65.

Pleadings: 12 Cal. 311; 17 Cal. 569; 18 Cal. 67; 19 Cal. 85, 476; 20 Cal. 211; 22 Cal. 457; 25 Cal. 82, 272; 27 Cal. 274; 28 Cal. 195; 29 Cal. 29; 30 Cal. 65; 31 Cal. 387; 33 Cal. 121, 595; 35 Cal. 122; 36 Cal. 187, 625; 38 Cal. 335; 40 Cal. 264.

Mortgages: 18 Cal. 492; 21 Cal. 495; 22 Cal. 109, 620; 23 Cal. 16, 142; 24 Cal. 403; 25 Cal. 492; 26 Cal. 141, 361; 33 Cal. 229; 33 Cal. 121; 34 Cal. 366.

Redemption: 23 Cal. 16; 24 Cal. 403; 33 Cal. 92; 34 Cal. 365; 40 Cal. 62.

CHAPTER II.

THE TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

SECTION 315. When the people will not sue.
316. When action can not be brought by grantee from the State.
317. When actions by the people or their grantees are to be brought within five years.
318. Seizen within five years, when necessary in action for real property.
319. Such seizen, when necessary in action or defence arising out of title to or rents of real property.
320. Entry on real estate.
321. Possession, when presumed. Occupation deemed under legal title, unless adverse.
322. Occupation under written instrument or judgment, when deemed adverse.
323. What constitutes adverse possession under written instrument or judgment.
324. Premises actually occupied under claim of title deemed to be held adversely.
325. What constitutes adverse possession under claim of title not written.
326. Relation of landlord and tenant as affecting adverse possession.
327. Right of possession not affected by descent cast.
328. Certain disabilities excluded from time to commence actions.

§ 315. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have

received the rents and profits of such real property, or of some part thereof, within the space of ten years.

Stat. 1850, 343, § 3.

18 Cal. 619; 40 Cal. 54.

§ 316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this State, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made.

Stat. 1850, 343, § 4.

§ 317. When letters patent or grants of real property, issued or made by the people of this State, are declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the property so conveyed may be brought either by the people of this State, or by any subsequent patentee or grantee of the same property, his heirs or assigns, within five years after such determination, but not after that period.

Stat. 1850, 343, § 5.

§ 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

Stat. 1863, 325, being the same as stat. 1850, 344, § 6. Amendment of 1855, 109, added: "Provided, however, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the government of the United States or its legally constituted authorities."

13 Cal. 510; 15 Cal. 275; 18 Cal. 435; 25 Cal. 556, 626.

Water rights: 8 Cal. 136; 25 Cal. 504; 27 Cal. 360; 32 Cal. 26.

§ 319. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the

ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defence made.

See stat. 1863, 325. This is the same as stat. 1850, 344, § 7. Amendment of 1855, 109, added: "Or unless it appear that the title to such premises was derived from the Spanish or Mexican governments, or that the same was confirmed by the government of the United States or its authorities within five years before the commencement of such action."

See § 8, as to existing rights.

The stat. 1863–4, 91, limited the time for action on mining claims to two years, instead of five, the language being the same as §§ 318, 319, except the words "property in mining claims," instead of "real property," and "two years" instead "five years."

Stat. 1864, 91.

24 Cal. 301; 29 Cal. 330.

§ 320. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

Stat. 1863, 326. Same as stat. 1850, 344, § 9; amendment of 1855, 109, read: "Any peaceable entry upon real estate shall be deemed sufficient and valid as a claim, unless an action be commenced by the plaintiff in ejectment, within one year after the making such entry; or within five years from the time when the right to bring such action accrued, or within five years after the final confirmation by the United States of any title derived from Spain or Mexico."

§ 321. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

Stat. 1850, 343–4, § 9.

33 Cal. 505.

§ 322. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such

claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Stat. 1850, 344, § 10.

Adverse possession and rights derived therefrom: 16 Cal. 591; 21 Cal. 455; 22 Cal. 580; 25 Cal. 619; 28 Cal. 175; 30 Cal. 229, 630; 31 Cal. 154, 585; 34 Cal. 379; 35 Cal. 634; 36 Cal. 535; 37 Cal. 349; 39 Cal. 262.

§ 323. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.

2. Where it has been protected by a substantial inclosure.

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant.

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Stat. 1850, 344, § 11.

30 Cal. 408; 31 Cal. 225.

§ 324. Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Stat. 1850, 344, § 12.

§ 325. For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written

instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Stat. 1850, 345, § 13.
20 Cal. 408; 22 Cal. 15.

§ 326. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

Stat. 1850, 344 § 14.
23 Cal. 237.

§ 327. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

Stat. 1850, 345, § 15.

§ 328. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defence founded on the title to real property, or to rents or services out of the same, be at the time such title first descends or accrues, either—

1. Within the age or majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defence.

The time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defence, but such action may be commenced, or entry or defence made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall

die under such disability; but such action shall not be commenced, or entry or defence made, after that period.

Same as stat. 1863. Stat. 1850, 345, did not contain the words "or for the recovery of the possession thereof," nor the words in fourth sub-division, "and her husband be a necessary party with her in commencing such action or making such entry or defence." The word "majority," in first sub-division, was in stat. 1850, "twenty-one years."

Mexican grants: 6 Cal. 381; 7 Cal. 1; 20 Cal. 225; 24 Cal. 124, 288; 26 Cal. 24; 27 Cal. 65; 29 Cal. 580; 31 Cal. 225; 33 Cal. 448; 39 Cal. 262; 40 Cal. 308.

CHAPTER III.

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

SECTION 335. Periods of limitation prescribed.
336. Within five years.
337. Within four years.
338. Within three years.
339. Within two years.
340. Within one year.
341. Within six months.
342. Same.
343. Actions for relief not hereinbefore provided for.
344. Where cause of action accrues on mutual account.
345. Actions by the people subject to the limitations of this chapter.
346. Action to redeem mortgage.
347. Same, when some of mortgagors are not entitled to redeem.

§ 335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

§ 336. Within five years:

An action upon a judgment or decree of any court of the United States, or of any state within the United States.

Stat. 1880, 343, read: "state or territory;" see § 16, subdivision 8, of this code.

4 Cal. 253, 287; 7 Cal. 247; 19 Cal. 97; 20 Cal. 211; 23 Cal. 352; 34 Cal. 666.

§ 337. Within four years:

An action upon any contract, obligation or liability founded upon an instrument in writing.

Stat. 1850, 345.

5 Cal. 57; 6 Cal. 617; 10 Cal. 126; 14 Cal. 134; 17 Cal. 172; 18 Cal. 482; 20 Cal. 130; 21 Cal. 495; 22 Cal. 598, 620; 23 Cal. 16, 223; 24 Cal. 403; 29 Cal. 503; 34 Cal. 149, 165.

§ 338. Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon real property.

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud *or mistake*. The cause of action in such case not to be deemed to have accrued until the discovrey, by the aggrieved party, of the facts constituting the fraud *or mistake*.

Stat. 1850, 343, did not contain the words "or mistake."

SUB-DIVISION 1: 18 Cal. 176.

SUB-DIVISION 2: 29 Cal. 330; 31 Cal. 487, 154.

SUB-DIVISION 4: 8 Cal. 449; 9 Cal. 423; 18 Cal. 225; 29 Cal. 20, 47; 3 Cal. 260; 34 Cal. 254.

§ 339. Within two years:

1. An action upon a contract, obligation or liability, not founded upon an instrument of writing.

2. An action against a sheriff, coroner or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

3. An action upon a judgment or upon a contract, obligation or liability for the payment of money or damages, founded upon an instrument in writing, executed out of this state.

4. An action to recover damages for the death of one caused by the wrongful act of another.

The first and second subdivisions are the same as stats. 1850, 345, and 1859, 376, except that stat. 1850, 345, excepted from the limitation of two years "an action upon an open account for goods, wares and merchandise, and an action for any article charged in a store account," and added the same to the limitations of one year. The amendment of 1859, 306, extended the limitation on those actions to two years.

The third subdivision is the same as stat. 1855, 75, which amended act of 1852, 164. The fourth is based upon stat. 1862, 407.

SUB-DIVISION 1: 17 Cal. 594; 20 Cal. 130; 21 Cal. 351; 22 Cal. 457; 24 Cal. 322; 35 Cal. 122.

§ 340. Within one year:

1. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the state, except where the statute imposing it prescribes a different limitation.

2. An action upon a statute for a forfeiture or penalty to the people of this state.

3. An action for libel, slander, assault, battery or false imprisonment.

4. An action against a sheriff, or other officer, for the escape of a prisoner, arrested or imprisoned on civil process.

5. Upon a contract, obligation or liability for the payment of money incurred out of this state and not founded upon a written contract.

The first four subdivisions are from stat. 1850, 343. The fifth is new.

§ 341. Within six months:

An action against an officer, or officer de facto, engaged in the collection of taxes:

1. For money paid to any such officer under protest, or seized by such officer in his official capacity as a collector of taxes, and which, it is claimed, ought to be refunded.

2. To recover any goods, wares, merchandise or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale or injury to any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure.

Stat. 1859, 206. *Vide* note to § 345.

[*An act—approved March* 11, 1872. *Took effect immediately.*

1. Where bankers' certificates of deposit have heretofore been given to any party since deceased, and not found until after administration of his or her estate, an action may be maintained thereon by the heirs or legal representatives at any time within six months after such finding.]

§ 342. Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board.

§ 343. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

Stat. 1850, 343.
17 Cal. 586.

§ 344. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Stat. 1850, 343.

30 Cal. 126, 134; 35 Cal. 122.

§ 345. The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.

Stat. 1850, 343. *Vide* note to § 341.

§ 346. (N. S.) An action to redeem a mortgage of real property with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage.

Vide § 701 and following.

§ 347. (N. S.) If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this chapter, any one of them, who is entitled to maintain such an action, may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money, as the value of his divided or undivided interest in the premises bears to the whole of such premises.

[*An act supplementary to an act entitled "an act defining the time for commencing civil actions," passed April* 22, 1850—*approved March* 16, 1872. *Took effect immediately.*

§ 1. There shall be no limitation upon the right to maintain an action for the recovery of money or other property deposited with any bank, banker, trust company, or savings and loan society.

§ 2. All acts and parts of acts in conflict herewith, so far as the same are in conflict, are hereby repealed.]

CHAPTER IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

SECTION 350. When an action is commenced.
351. Exception, where defendant is out of the State.
352. Exception as to persons under disabilities.
353. Provision where person entitled dies before limitation expires.
354. In suits by aliens, time of war to be deducted.
355. Provision where judgment has been reversed.
356. Provision where action is stayed by injunction.
357. Disability must exist when right of action accrued.
358. When two or more disabilities exist, etc.
359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed.
360. Acknowledgment or new promise must be in writing.
361. Limitation laws of other States, effect of.
362. Existing causes of action not affected.
363. "Action" includes a special proceeding.

§ 350. An action is commenced, within the meaning of this title, when the complaint is filed.

Stat. 1850, 343.
19 Cal. 577; 21 Cal. 351; 34 Cal, 166; 35 Cal. 122.

§ 351. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

Stat. 1850, 343.
6 Cal. 430; 16 Cal. 93.

§ 352. If a person entitled to bring an action, mentioned in chapter three of this title, be at the time the cause of action accrued, either –

1. Within the age of majority; or,
2. Insane; or,

3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,

4. A married woman, and her husband be a necessary party with her in commencing such action.

The time of such disability is not a part of the time limited for the commencement of the action.

Stat. 1863, 325, inserted except for a penalty or forfeiture.

SUB-DIVISION 2: 27 Cal. 376.

SUB-DIVISION 4: 36 Cal. 447.

§ 353. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his *representatives* after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Stat. 1850, 343. read "executors or administrators."

10 Cal. 386; 19 Cal. 85, 97.

§ 354. When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

Stat. 1850, 343.

§ 355. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives may commence a new action within one year after the reversal.

Stat. 1850, 343.

§ 356. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Stat. 1850, 343.

§ 357. No person can avail himself of a disability, unless it existed when his right of action accrued

Stat. 1850, 343.

§ 358. When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are removed.

Stat. 1850, 313.

§ 359. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

Stat. 1850, 343.

§ 360. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.

Stat. 1850, 343.

9 Cal. 80; 17 Cal. 351, 574; 21 Cal. 142; 22 Cal. 100; 25 Cal. 292; 36 Cal. 180, 187; 39 Cal. 434.

§ 361. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, *except in favor of one who has been a citizen of this State and who has held the cause of action from the time it accrued.*

Stat. 1852, 161, did not contain words in *italics*.

6 Cal. 430.

§ 362. This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section.

§ 363. (N. S.) The word "action," as used in this title, is to be construed whenever it is necessary so to do, as including a special proceeding of a civil nature.

TITLE III.

OF THE PARTIES TO CIVIL ACTIONS.

SECTION 367. Action to be in name of party in interest.
368. Assignment of thing in action not to prejudice defence.
369. Executor, trustee, etc., may sue without joining the persons beneficially interested.
370. When a married woman is a party—actions by and against.
371. Wife may defend, when.
372. Infant to appear by guardian.
373. Guardian, how appointed.
374. Unmarried female may sue, for her own seduction.
375. Father, etc., may sue, for seduction of daughter, etc.
376. Father, etc., may sue, for injury or death of child.
377. When representatives may sue for death of one caused by the wrongful act of another.
378. Who may be joined as plaintiffs.
379. Who may be joined as defendants.
380. Parties defendant in an action to determine conflicting claims to real property.
381. Parties holding title under a common source, when may join.
382. Parties in interest, when to be joined. When one or more may sue or defend for the whole.
383. Plaintiff may sue in one action the different parties to commercial paper.
384. Tenants in common, etc., may sever in bringing or defending actions.
385. Action, when not to abate by death, marriage or other disability. Proceedings in such case.
386. Another person may be substituted for the defendant.
387. Intervention, when it takes place and how made.
388 Associates may be sued by name of association.
389. Court, when to decide controversy or to order other parties to be brought in.

§ 367. (§ 4.) Every action must be prosecuted in the name of the real party in interest, except as *provided in section three hundred and sixty-nine.*

Stat. 1851, 51, read: "except as otherwise provided in this act."

Stat. 1854, 59, added to stat. 1851, the words: "but this section shall not be deemed to authorize the assignment of an account, unliquidated demand, or of a thing in action not arising out of contract."

Stat. 1855, 303, added to the stat. 1851, the words: "but in suits brought by the assignee of an account, unliquidated demand, or thing in action not arising out of contract, assigned subsequently to the first day of July, 1854, the assignor shall not be a witness on behalf of the plaintiff."

Stat. 1863–4, 29, restored the stat. 1851.

6 Cal. 247, 456; 7 Cal. 551; 9 Cal. 325; 10 Cal. 347; 18 Cal. 126, 426; 22 Cal. 139, 173, 356, 430; 26 Cal. 122; 29 Cal. 19, 210; 32 Cal. 590; 33 Cal. 121; 35 Cal. 596.

Bonds: 7 Cal. 551; 10 Cal. 347; 13 Cal. 588; 15 Cal. 9; 23 Cal. 540; 29 Cal. 194.

Choses in action: 9 Cal. 325; 12 Cal. 97; 14 Cal. 402; 18 Cal. 126; 22 Cal. 187; 27 Cal. 249; 29 Cal. 150; 31 Cal. 240; 35 Cal. 345.

Torts: 5 Cal. 456; 22 Cal. 139, 173; 32 Cal. 590.

§ 368. (§ 5.) In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before *maturity*.

5 Cal. 325; 19 Cal. 646; 20 Cal. 509.

Judgments: 12 Cal. 257; 22 Cal. 430; 23 Cal. 255, 596; 25 Cal. 539; 33 Cal. 525.

Promissory notes: 8 Cal. 263; 14 Cal. 94, 450.

§ 369. (§ 6.) An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. *A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.*

Executor or administrator: 14 Cal. 117; 15 Cal. 259; 16 Cal. 579; 18 Cal. 11; 23 Cal. 16.

Trustee: 18 Cal. 11; 26 Cal. 25; 32 Cal. 111; 34 Cal. 136.

§ 370. (§ 7.) When a married woman is a party, her husband must be joined with her, except—

1. When the action concerns her separate property or her right or claim to the homestead property, she may sue alone.

2. When the action is between herself and her husband she may sue or be sued alone.

3. *When she is living separate and apart from her husband, she may sue or be sued alone.*

Stat. 1851, 52, omitted, the words: "or her right or claim to the homestead property;" also the words in *italics*.

Stat. 1867-'68, 550, omitted the words in *italics*.

3 Cal. 83, 312; 15 Cal. 308; 17 Cal. 578; 19 Cal. 128; 22 Cal. 457; 26 Cal. 435; 30 Cal. 491; 31 Cal. 333; 32 Cal. 83.

Homestead: 5 Cal. 504; 6 Cal. 71; 8 Cal. 66, 74, 347; 9 Cal. 96; 10 Cal. 296; 14 Cal. 506.

§ 371. (§ 8.) If a husband and wife be sued together, the wife may defend for her own right, *and if the husband neglect to defend, she may defend for his right also.*

5 Cal. 387; 9 Cal. 315.

§ 372. (§ 9.) When an infant is a party he must appear by *his general guardian if he has one, and if not by a* guardian who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

19 Cal. 210, 629; 31 Cal. 374; 32 Cal. 111.

§ 373. (§ 10.) *When a* guardian *is appointed by the court he* must be appointed as follows:

1. When the infant is plaintiff: upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant: upon the application of the infant, if he be of the age of fourteen years and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

§ 374. (N. S.) An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

§ 375. (N. S.) A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living

with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

§ 376. (§ 11.) A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward.

25 Cal. 434.

§ 377. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action, the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just.

Stat. 1862, 447–8, read as follows: "Section 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person, who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. Whenever the death of any person shall be caused by an injury received in falling through, or by drowning after having fallen through, any opening or defective place in any sidewalk, street, alley or wharf in any city or incorporated town, the death of such person shall be deemed to have been caused by the wrongful neglect and default of the person or persons, corporation or company, firm or association whose duty it was, at the time said person received such injury, to have kept in repair such sidewalk, street, alley, or wharf, or who was or were at that time, liable to have been ordered or notified to make, or to have been assessed for the expenses of making, the repairs on such sidewalk, street, alley, or wharf, where the injury to such person occurred.

"Sec. 3. Every such action shall be brought by and in the names [of] the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the

widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the wife and next of kin of such deceased person; *provided*, That every such action shall be commenced within two years after the death of such deceased person."

§ 378. (§ 12.) All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title.

Stat. 1851, 52, read: "act."

5 Cal. 149; 8 Cal. 77, 514; 10 Cal. 302; 24 Cal. 172; 25 Cal. 242; 26 Cal. 337; 31 Cal. 420; 33 Cal. 497; 37 Cal. 34, 183.

Tenants in common: 21 Cal. 202; 30 Cal. 481.

§ 379. (§ 13.) Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. *And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.*

Original section referred to equity cases only: 9 Cal. 268, but see 37 Cal. 389.

Generally: 1 Cal. 478; 12 Cal. 103, 105; 14 Cal. 279; 17 Cal. 262, 467; 22 Cal. 200; 33 Cal, 514; 39 Cal. 379.

Trusts: 7 Cal. 92; 30 Cal. 455, 556.

The last sentence of the section changes more or less the law laid down in the following ejectment cases: 4 Cal. 70; 6 Cal. 33; 9 Cal. 268; 11 Cal. 366; 22 Cal. 200; 28 Cal. 535; 32 Cal. 488.

Parties in foreclosure suits: See section 726.

§ 380. (N. S.) In an action brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and all persons in possession must be joined as defendants.

§ 381. Persons claiming an interest in lands under a common source of title may unite as plaintiffs in an action against

any person claiming an adverse interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or for removing a cloud thereon.

Stat. 1867-'68, 153, read: "Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint-tenants, copartners, [coparceners] (?) or in severalty, may unite in an action against, etc.

§ 382. (§ 14.) Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

1 Cal. 55; 6 Cal. 506; 7 Cal, 330; 14 Cal. 531; 16 Cal. 145; 27 Cal. 56.

§ 383. (§ 15.) Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

Vide *post*, § 414; also, § 578.

6 Cal. 176; 25 Cal. 520; 29 Cal. 429.

See section 413.

§ 384. All persons holding as tenants in common, joint tenants or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

Stat. 1857, 62, *vide* § 381.

§ 385. (§ 16.) An action *or proceeding* does not abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, *marriage* or other disability of a party, the court, on motion, may allow the action *or proceeding* to be continued by or against his representative or successor in interest. In case of any other transfer of interest,

the action *or proceeding* may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action or proceeding.

5 Cal. 281; 20 Cal. 68; 21 Cal. 443; 29 Cal. 359, 444; 30 Cal. 467; 31 Cal. 333; 32 Cal. 493; 34 Cal. 90; 35 Cal. 466; 37 Cal. 389; 40 Cal. 96.

§ 386. (§ 658.) A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

Stat. 1854, 72-3.

8 Cal. 592.

§ 387. (§§ 659, 660, 661.) Any person may *before the trial*, intervene in an action *or proceeding*, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action *or proceeding* between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding, who may answer it as if it were an original complaint.

Stat. 1854, 73, in substance; except that it provided that a third person might intervene "either before or after issue has been joined in the cause," and "by petition or complaint," a copy to be served upon "the party or parties to the action against whom anything is demanded;" and the court was required to determine upon the intervention at the same time the action was decided; the intervenor to pay costs incurred by the intervention, if he failed.

5 Cal. 281, 504; 6 Cal. 256; 7 Cal. 35; 13 Cal. 62; 10 Cal. 296; 18 Cal. 378; 21 Cal. 280, 441; 23 Cal. 143; 29 Cal. 159, 673; 37 Cal. 532.

§ 388. (§ 656.) When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; *and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability.*

Stat. 1854, 72, omitting *italicised* words; and inserting "only" between "bind" and "the joint."

22 Cal. 356; 30 Cal. 202.

§ 389. (§ 17.) The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. *And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.*

5 Cal. 231, 114; 9 Cal. 96, 697; 12 Cal. 213; 22 Cal. 200; 27 Cal. 329; 30 Cal. 490; 38 Cal. 514.

TITLE IV.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

SECTION 392. Certain actions to be tried where the subject or some part thereof is situated.
393. Other actions, where the cause or some part thereof arose.
394. Place of trial of actions against counties.
395. Other actions according to the residence of the parties.
396. Action may be tried in any county, unless the defendant demand a trial in the proper county.
397. Place of trial may be changed in certain cases.
398 When judge is disqualified, cause to be transferred.
399. Papers to be transmitted. Costs, etc. Jurisdiction, etc.
400. Proceedings after judgment in certain cases transferred.

§ 392. (§ 18.) Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property.

Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

Stat. 1861, 491, the same in substance. Stat. 1851, 53, omitted the words which follow sub-division 3. Vide *post*. §§ 393-400.

5 Cal. 461; 13 Cal. 321; 15 Cal. 220; 16 Cal. 432; 23 Cal. 508.

§ 393. (§ 19.) Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offence committed on a lake, river or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer.

Vide sections referred to in note to § 392.

9 Cal. 420.

§ 394. Actions against counties may be commenced and tried in any county in the judicial district in which such county is situated, unless such actions are between counties, in which case they may be commenced and tried in any county not a party thereto.

Stat. 1854, 45, read: "Suits against a county may be commenced in any court of that county, or in a district court of the judicial district in which said county is situated, in the same manner as suits against private persons; *provided*, that suits between counties shall be commenced in a court of competent jurisdiction in any county not a party to such action." *Vide* sections referred to in note to § 392.

§ 395. (§ 20.) In all other cases, the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action; or, if none of the defendants reside in the State, or, if residing in this State, the the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the State, such action may be tried in any county where either of the parties reside or service is had; subject, however, to the power of the court to change the place of trial as provided in this code.

Stat. 1851, 53, inserted "parties" instead of "defendants;" also, omitted the words "or, if residing in this State, the county in which they reside is unknown to plaintiff," and the words, "and if the defendant is about to depart from the State, such action may be tried in any county where either of the parties reside or service is had."

15 Cal. 220, 418; 22 Cal. 537.

§ 396. (N. S.) If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.

Vide sections referred to in note to § 392.

§ 397. (§ 21.) The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county.

2. When there is reason to believe that an impartial trial can not be had therein.

3. When the convenience of witnesses and the ends of justice would be promoted by the change.

4. When from any cause the judge is disqualified from acting.

Vide sections referred to in note to § 392.

3 Cal. 410, 438; 5 Cal. 117; 6 Cal. 154; 9 Cal. 607, 642; 13 Cal. 321; 15 Cal. 418; 22 Cal. 127, 537; 23 Cal. 165, 376; 24 Cal. 73, 78; 28 Cal. 245; 32 Cal. 208; 37 Cal. 190.

Bias of judge: 12 Cal. 500; 23 Cal. 592; 24 Cal. 31.

§ 398. If an action or proceeding is commenced or pending in a court and the judge or justice thereof is disqualified from acting as such, or if for any cause the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

1. If in the district court, to another district court.

2. If in a county court, to some other county court.

3. If in the probate court, to some other probate court.

4. If in a justice's court, to another justice's court in the same county.

Stat. 1854, 42-3, was identical down to the sub-divisions: and included sub-divisions 1 and 4, numbered as 1 and 5; also, three sub-divisions, numbered 2, 3 and 4, as follows:

"Second—If, in the superior court of San Francisco, to a district court."

"Third—If in a county court, to a district court, or some other county court."

"Fourth—If in the probate court, to a district court, or some other probate court."

Stat. 1863, 336, read: "Whenever an action or proceeding is commenc d in a district court, in which a county court has concurrent jurisdiction, the district court may, if the parties consent, by order, transfer the same to the county court of the same county. Upon such transferrence, the county court shall have and exercise over such action or proceeding the same jurisdiction as if originally commenced therein.'

Stat. 1855, 30, made 13 provisions for transferring cases from State courts to U. S. courts. *Vide* sections referred to in note to § 392.

§ 399. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

Stat. 1854, 43, section 2, is identical down to and including the word 'transferred," and then adds the words: "If the transfer is made on the ground that a judge or justice is disqualified from acting, the costs and fees thereof, and of re-entering and filing the pleadings and papers anew, are to abide the event of the action or proceeding; in other cases they are to be paid by the party at whose instance the order is made."

And section 3 of said statute is identical with the last sentence of the above section, with the addition of the words, "and may, by order or execution, enforce the judgment."

Vide sections referred to in note to § 392.

§ 400. When an action or proceeding affecting the title or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must

file docket and record the judgment in the records of the court, briefly designating it as a judgment transferred from ——— court (naming the proper court).

Vide sections referred to in note to § 392.

TITLE V.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

SECTION 405. Actions, how commenced.
406. Complaint, how indorsed. When summons may be issued, and how waived.
407. Summons, how issued, directed, and what to contain.
408. Alias summons.
409. Notice of the pendency of an action affecting the title to real property.
410. Summons, how served and returned.
411. Summons, how served.
412. Publication when defendant is absent from the State, concealed, or a foreign corporation having no agent, etc.
413. Manner of publication and appointment of attorney.
414. Proceedings where there are several defendants and part only are served.
415. Proof of service, how made.
416. When jurisdiction of action acquired.

§ 405. (§ 22.) Civil actions in the courts of this State are commenced by filing a complaint and the issuing of summons thereon.

Stat. 1851, 54, read: "Civil actions in the district courts, superior court of the city of San Francisco, and the county courts, shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuance of a summons thereon."

Stat. 1855, 303, added to the stat. of 1851, the words: "Provided, That after the filing of the complaint a defendant in the action may appear, answer, or demur, whether the summons has been issued or not, and such appearance, answer or demurrer shall be deemed a waiver of summons."

4 Cal. 280; 10 Cal. 374; 19 Cal. 577; 21 Cal. 51; 29 Cal. 238; 34 Cal. 165.

§ 406. (§ 23.) The clerk must indorse on the complaint the day, month and year that it is filed, and at any time within one year thereafter the plaintiff may have summons issued. *But at any time after the complaint is filed the defendant may,*

in writing, or by appearing and answering or demurring, waive the issuing of summons.

Stat. 1851, 54, read: "The clerk shall indorse on the complaint, the day, month, and year the same is filed; and at any time after the filing, the plaintiff may have a summons issued. The summons shall be signed by the clerk, and directed to the defendant, and be issued under the seal of the court."

Stat. 1860, 298, substituted for the *italicised* words: "The summons shall be signed by the clerk, and directed to the defendant, and be issued under the seal of the court."

29 Cal. 238; 31 Cal. 166; 35 Cal. 296; 36 Cal. 585.

§ 407. (§§ 23, 24, 25, 26.) The summons must be directed to the defendant, signed by the clerk and issued under the seal of the court, and must contain—

1. The names of the parties to the action, the court in which it is brought and the county in which the complaint is filed.

2. The cause and general nature of the action.

3. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within twenty days, if served out of the county but in the district in which the action is brought, and within forty days, if served elsewhere

4. In an action arising on contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint (stating it).

5. In other actions, a notice that unless defendant so appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint.

The name of the plaintiff's attorney must be indorsed on the summons.

Vide supra, § 406.

Section 24, stat. 1851, 54, was as follows: "The summons shall state generally the nature of the action; the parties thereto; the court in which it is brought; the county in which the complaint is filed; and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of the summons, exclusive of the day of service; or that judgment, by default, will be taken against him."

Section 25, stat. 1851, 54, was in substance sub-division 3.

Section 26, stat. 1851, was in substance sub-divisions 4 and 5.

Stat. 1854, 59, amended stat. 1851, sec. 24, by omitting the first clause

and adding the words: "according to the prayer of the complaint, briefly stating the sum or other relief demanded in the complaint."

Stat. 1859, 39, restored the substance of the clause omitted by stat. 1854, and added to the addition of 1854, the words: "and the clerk shall indorse on the summons the names of the plaintiff's attorneys." And as amended it did not apply to counties of Solano, Fresno, Tulare, Calaveras, Sutter, Sonoma, Butte, Mariposa, Yolo, Contra Costa, Tehama, Los Angeles, Monterey, Plumas, San Bernardino, Stanislaus, San Joaquin, Yuba, Merced, Trinity, Humboldt, Klamath, Del Norte, Tuolumne, Santa Cruz, Shasta, Napa, El Dorado, Placer, Santa Barbara, San Luis Obispo, Marin, Mendocino, Alameda, Santa Clara, and Amador, *vide* stat. 1859, 155.

2 Cal. 193, 241; 5 Cal. 465; 7 Cal. 584; 8 Cal. 619; 18 Cal. 420.

§ 408. (N. S.) If the summons is returned without being served on any or all of the defendants, the clerk, upon the demand of the plaintiff, may issue an alias summons in the same form as the original.

§ 409. (§ 27.) In an action affecting real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties to, and the object of, the action *or defence*, and a description of the property in that county affected thereby. From the time of filing, only, is the pendency of the action constructive notice to a purchaser or encumbrancer of the property affected thereby.

26 Cal. 124; 29 Cal. 131; 13 Cal. 367, 592; 15 Cal. 263; 17 Cal. 149; 18 Cal. 102, 205; 21 Cal. 107; 22 Cal. 200; 23 Cal. 38, 335, 409; 24 Cal. 427; 27 Cal. 50; 28 Cal. 194; 34 Cal. 615; 36 Cal. 390.

[*Amendment approved March* 2, 1872. Stat. 1871–72; Chap. 170

§ 27. In an action affecting *the title to* real property, *or the right to the possession of real property*, the plaintiff at the time of filing his complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, *may record* with the County Recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the

parties to and the object of the action, and a description of the property in that county affected thereby; *and the defendant may also, in such notice, state the nature and extent of the relief claimed in the answer:* from the time of filing *for record* only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.]

Stat. 1851, 54, contained the words: "the title to" between "affecting" and "real"; but omitted the words: "And the defendant at the time of filing his answer, when affirmative relief is claimed in such answer."

Stat. 1862, 572, inserted, between "county affected thereby," and "from," the words: "and the defendant may also in such notice state the nature and extent of the relief claimed in the answer;" also the words: "the title to" between "affecting" and "real"; both statutes omitted *italicised* words.

Stat. March 2, 1872, is same as stat. 1862, inserting the words: "or the right to the possession of real property," between "real property" and "the plaintiff."

§ 410. (§ 28.) The summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action. A copy of the complaint must be served with the summons, unless there is more than one defendant residing in the same county, in which case a copy of the complaint must be served upon one of them. When the summons is served by the sheriff, it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint.

As to justices courts *vide* § 849.

Stat. 1870, 574, read: "The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought, or by any white male citizen of the United States, over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided. A copy of the complaint shall be served with summons. Where the summons is served by the sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer of its service, and of the service of the copy of the complaint, to the office of the clerk from which the summons issued. When the summons is served by any other person as before provided, it shall be returned to the office of the clerk from which it issued, with

the affidavit of such person of its service, and of the service of a copy of the complaint, If there be more than one defendant in the action, and such defendants reside within the county, a copy of the complaint need be served on only one of the defendants."

Stat. 1851, 55, read as follows: "The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought. A copy of the complaint, certified by the clerk, shall be served with the summons. The summons shall be returned with the certificate or affidavit of the officer, of its service, and of the service of the copy of the complaint, to the office of the clerk from which the summons issued."

Stat. of 1854, 59, inserted between the words "is brought" and "a copy," the words "except as is hereafter provided," and added the words "*Provided*, if there be more than one defendant to the action, and such defendants reside within three miles of the county clerk's office, a copy of the complaint need be served only on one of the defendants."

The section as it then stood in 1854, was amended by statute 1855, 61, by omitting the words "or a person specially appointed by him, or appointed by a judge of the court in which the action is brought, except as hereinafter provided," and inserting, in lieu, the words: "or by any other person competent to be a witness in the cause;" and omitting the words "certified by the clerk;" and requiring the return with "certificate of the officers or the affidavit of the person."

Stat. of 1855, 196, again amended the section as it stood in 1854, by inserting between the words "is brought" and "except as" the words "or by any white male citizen of the United States over twenty-one years of age, who is competent to be a witness on the trial of the action;" and requiring the return of service of summons and copy of the complaint with the "certificate or affidavit of the officer," or "the affidavit of such person."

Stat. of 1855, 304, repealed 1854.

Stat. of 1859, 39, amending that of 1851, read as follows:

"The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought, or by any white male citizen of the United States over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided. When the summons is served by the sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer, of its service. When the summons is served by any other person as before provided, it shall be returned to the office of the clerk from which it issued, with the affidavit of such person of its service. At the time of filing the complaint, a true and correct copy thereof shall be deposited with the clerk of the court, by the plaintiff or his attorney, for the use of the party defendant; which copy shall be by the clerk delivered to the defendant's attorney, or any party defendant named in the complaint, demanding and receipting for the same. In

case no such copy is deposited by the plaintiff or his attorney, the defendant or his attorney may have a copy of the complaint made and certified by the clerk of the court, the fees for which shall be taxed as costs, to abide the final result of the action.'

(This had no effect upon actions commenced before May 20, 1850, and was applicable to certain counties only; *vide* note to § 407).

Statute of 1860, 278, restores the section as it stood after the last amendment of 1855, except that when the defendants reside within the county, only one defendant need be served with copy of the complaint.

Stat. 1870, 574, omitted the words "certified by the clerk." Vide, *supra*.

5 Cal. 449; 6 Cal. 85; 11 Cal. 372; 23 Cal. 401; 28 Cal. 152; 31 Cal. 233; 34 Cal. 463; 37 Cal. 458.

§ 411. (§ 20.) The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation: to the president, or other head of the corporation, secretary, cashier or managing agent thereof.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association doing business *and having a managing or business agent, cashier or secretary* within this State: to such agent, cashier or secretary.

3. If against a minor under the age of fourteen years: to such minor personally, and also to his father, mother or guardian; or if there be none within the State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person judicially declared to be of unsound mind or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such guardian.

5. *If against a county, city or town: to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof.*

6. In all other cases: to the defendant personally.

As to justices' courts, *vide* § 859.

Stat. 1851, 55, embraced only subdivisions 1, 3, 4 and 6, and the words "attached to the certified copy of the complaint," between the words "thereof" and "as follows."

Stat. 1851, 59-60, embraced only subdivisions 1, 3, 4 and 6.

Stat. 1861, 426, embraced the last amendment, only subdivisions 1, 3, 4 and 6, and that portion of subdivision 2 not italicised.

Stat. 1851, 45, provided as follows: "In counties where there is a board of supervisors, having an acting chairman or president of such board, the original process and papers shall be served on such chairman

or president in the same manner as upon private persons; when there is no such chairman or president, they shall in like manner be served upon the county judge of the county."

16 Cal. 336; 3 Cal. 247; 9 Cal. 616.

Corporations: 6 Cal. 186; 10 Cal. 243, 441, 445.

§ 412. * (§ 30.) Where the person on whom the service is to be made resides out of the State, or has departed from the State, or can not after due diligence be found within the State, or conceals himself to avoid the service of summons, *or (is a foreign corporation having no managing or business agent, cashier or secretary within the State,)* and the fact appears by affidavit to the satisfaction of the court or a judge thereof (or a county judge), and it *also appears by such affidavit or by the verified complaint or file*, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons.

Expressly applied to justices' courts, *vide* § 849.

Stat. 1851, 55, inserted the words "in like manner appears," for the words in *italics*. For provisions touching service by telegraph, *vide* stat. 1862, 288-293.

4 Cal. 394; 6 Cal. 201; 8 Cal. 449; 12 Cal. 100, 563; 20 Cal. 81; 26 Cal. 149; 27 Cal. 300; 30 Cal. 610; 31 Cal. 342; 34 Cal. 391, 646.

§ 413. * (§ 31.) The order must direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months. In case of publication where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, is equivalent to publication and deposit in the postoffice. In either case, the service of the summons is complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money,

the court in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, and conduct the proceedings on his part.

[Stat. March 2, 1 72, chap. 171, is identical with the above section. *Vide* Act March 15, 1872, following § 416.]

Expressly applied to justices' courts, *vide* § 849.

Stat. 1870, 511, inserted between "two months" and "in case," the words "and provided further, that when such publication is made in the paper known as the 'State paper,' it shall not be made elsewhere."

Stat. 1851, 55, read "three months," instead of "two months."

5 Cal. 465; 9 Cal. 107, 616; 12 Cal. 100; 26 Cal. 149; 32 Cal. 347

§ 414. (§ 32.) When the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendant served in the same manner as if they were the only defendants.

Vide § 989.

Stat. 1851, 56, read: "Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

"1st. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or,

"2d. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants."

2 Cal. 88; 3 Cal. 467; 6 Cal. 176, 607; 12 Cal. 348; 18 Cal. 399, 402; 13 Cal. 558; 7 Cal. 413; 10 Cal. 511; 17 Cal. 564; 29 Cal. 429; 30 Cal. 534; 35 Cal. 605. Tay vs. Hawley, 39 Cal. 93; 40 Cal. 577.

§ 415. (§§ 33, 34.) Proof of the service of summons *and complaint* must be as follows:

1. If served by the sheriff, his certificate thereof.
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited; or,
4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service.

Stat. 1851, 56, subdivision 1, read: "If served by the sheriff or his deputy, the affidavit or certificate of such sheriff or deputy."

3 Cal. 192; 5 Cal. 449; 6 Cal. 294; 7 Cal. 279; 9 Cal. 315, 616; 11 Cal. 307, 372; 23 Cal. 401; 27 Cal. 295; 31 Cal. 238; 34 Cal. 403. 612; 35 Cal. 533; 37 Cal. 458.

§ 416. (§ 35.) From the time of the service of the summons and copy of complaint in a civil action the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

4 Cal. 290; 7 Cal. 62, 534; 21 Cal. 51; 30 Cal. 439; 31 Cal. 342; 34 Cal. 391, 579; 40 Cal. 640.

[*An Act concerning Service of Summons upon absent Defendants by Publication.* Approved March 15, 1872.

An act concerning service of summons upon absent defendants by publication, approved March 15, 1872, is repealed. (In effect March 30, 1874.)

to me in the office of the Secretary of State, within fifteen days after the making of such order, a duly certified copy of such order for publication, together with a copy of the summons in said action, and of the newspaper containing the publication thereof.

SEC. 2. For his services in filing and indexing the order, summons and newspaper in which publication is made in each action, and for issuing his certificate of the receipt and filing thereof, the plaintiff shall pay to the Secretary of State the sum of one dollar, to be paid into the State Treasury and accounted for as by law provided in the case of other fees collected in said office.

SEC. 3. The Secretary of State on receipt of the papers above mentioned, and on payment of the fee above mentioned, shall issue to the plaintiff in said action his certificate under his hand and official seal, specifying the title of the action, the court in which the same is brought, the names of the defendants as to whom publication of summons was directed to be made, and the date at which the same were filed in his office.

He shall also in a book to be provided for that purpose, index the names of the defendants as to whom publication of summons was directed to be made, and note therewith the title of the action, the court in which such action is brought, the papers therein filed in his office, and the date of filing the same. and shall also endorse the date of filing upon said papers, and preserve the same in his office for reference by all persons interested therein; and the said book and said papers shall at all times be open to the gratuitous inspection of all persons applying to examine the same. Said book shall be known and referred to as the "Register of Absent Defendants."

SEC. 4. The plaintiff in such action shall file the certificate of the Secretary of State above mentioned, with the Clerk of the court in which such action is brought, together with the proof of publication of the summons therein, and service of summons by publication shall not be deemed to be complete as to any absent defendant, without the filing of said certificate as above required.]

TITLE VI.

OF THE PLEADINGS IN CIVIL ACTIONS.

CHAPTER I. THE PLEADINGS IN GENERAL.
II. THE COMPLAINT.
III. DEMURRER TO THE COMPLAINT.
IV. THE ANSWER.
V. DEMURRER TO ANSWER.
VI. VERIFICATION OF PLEADINGS.
VII. GENERAL RULES OF PLEADING.
VIII. VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS.

CHAPTER I.

THE PLEADINGS IN GENERAL.

SECTION 420. Definition of pleadings.
421. This code prescribes the form and rules of pleadings.
422. What pleadings are allowed.

§ 420. (§ 36.) The pleadings are the formal allegations by the parties of their respective claims and defences, for the judgment of the court.

§ 421. (§ 37.) The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this *code*.

§ 422. (§ 38.) The only pleadings *allowed* on the part of the plaintiff are—

1. The complaint.
2. The demurrer to the answer.

And on the part of the defendant—

1. The demurrer to the complaint.
2. The answer.

Stat. 1851, 56, read: "defendant's answer," instead of "the answer," in subdivision 2, of plaintiff's pleadings.

Stat. 1855, 303, added to stat. 1851, the words: "The demurrer or answer of the defendant shall be filed with the clerk of the court, and a copy thereof served upon the plaintiff or his attorney; *Provided*, the plaintiff or his attorney reside within the county where the action is pending."

Stat. 1860, 298, read: "33. The only *pleadings* on the part of the plaintiff shall be the complaint, demurrer, *or replication* to the defendant's answer, and the only *pleadings* on the part of the defendant shall be a demurrer *to the complaint, or a demurrer to the replication, or an answer to the complaint.* The demurrer or answer of the defendant, *and the demurrer or replication of the plaintiff*, shall be filed with the clerk, and a copy thereof served *on the adverse party*, or his attorney."

Stat. 1863, 578, added to the stat. 1851, the same words as stat. 1855, inserting the words "and the demurrer of plaintiff" between "defendant" and "shall be filed."

Stat. 1865-'66, 701-2, read: "Sec. 38. The pleadings on the part of the plaintiff shall be the complaint or demurrer to the defendant's answer; the pleadings on the part of the defendant to the original complaint or cross complaint of a co-defendant shall be the demurrer or answer. When a defendant is entitled to relief as against the plaintiff alone, or against the plaintiff and a co-defendant, he may make a separate statement in his answer of the necessary facts, with a prayer for the relief sought, instead of bringing a distinct cross action. All pleadings subsequent to the original complaint shall be filed with the clerk, and a copy thereof served on the adverse party or his attorney, if the adverse party or his attorney live within the county where the action is pending; *provided*, that when the answer contains a cross complaint, the parties plaintiff or defendant, or his or their attorney thereto, shall be served with a copy thereof, and shall have the same time thereafter to plead thereto that is allowed for pleading to the original complaint after service of the summons"

CHAPTER II.

THE COMPLAINT.

SECTION 425. Complaint, first pleading.
426. Complaint, what to contain.
427. What causes of action may be joined.

§ 425. The first pleading on the part of the plaintiff is the complaint.

§ 426. (§ 30.) The complaint must contain—

1. The title of the action, the name of the court and county

in which the action is brought, and the name of the parties to the action.

2. A statement of the facts constituting the cause of action, in ordinary and concise language.

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

Stat. 1851, 56, added "plaintiff and defendant" to subdivision 1; also inserted "specifying" before "the name."

Leading cases: 2 Cal. 108; 10 Cal. 22; 14 Cal. 457. Green vs. Palmer, 15 Cal. 411. Payne vs. Treadwell, 16 Cal 243; 23 Cal. 165: 30 Cal. 318, 570; 32 Cal. 453; 34 Cal. 145, 679: 35 Cal. 713; 37 Cal. 230; 38 Cal. 507; 39 Cal. 585; 40 Cal. 543.

§ 427. (§ 64.) The plaintiff may unite several causes of action in the same complaint where they all arise out of—

1. Contracts express or implied.

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

3. Claims to recover specific personal property, with or without damages for the withholding thereof.

4. Claims against a trustee by virtue of a contract or by operation of law.

5. Injuries to character.

6. Injuries to person.

7. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

Stat. 1851, 59-60, omitted the last clause beginning with the words: "but an action," which was added by stat. 1855, 199.

4 Cal. 27; 5 Cal. 224; 7 Cal. 133; 9 Cal. 642; 23 Cal. 197; 32 Cal. 585.

SUB-DIVISION 1: 10 Cal. 233, 299; 22 Cal. 457; 24 Cal. 382; 25 Cal. 266; 28 Cal. 105, 632.

SUB-DIVISION 2: 4 Cal. 291; 14 Cal. 25.

SUB-DIVISION 7: 3 Cal. 440; 12 Cal. 555; 32 Cal. 590.

Causes of action must be separately stated: 14 Cal. 146; 15 Cal. 180; 18 Cal. 581.

CHAPTER III.

DEMURRER TO THE COMPLAINT.

SECTION 430. When defendant may demur.
431. Demurrer must specify, etc. May be taken to part. May answer and demur at same time.
432. What proceedings are to be had when complaint is amended.
433. Objection not appearing on complaint, may be taken by answer.
434. Objections, when deemed waived.

§ 430. (§ 40.) The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible or uncertain.

Stat. 1851, 57, omitted, subdivision 7; also the words: "or misjoinder" in subdivision 4, both of which omissions were supplied by stat. 1859, 139.

SUB-DIVISION 1: 6 Cal. 386; 16 Cal. 432.

SUB-DIVISION 3: 32 Cal. 620.

SUB-DIVISION 4: 10 Cal. 167; 21 Cal. 633; 26 Cal. 336; 31 Cal. 420; 38 Cal. 514.

SUB-DIVISION 5: 10 Cal. 217; 7 Cal. 133.

SUB-DIVISION 6: 10 Cal. 347; 26 Cal. 294; 30 Cal. 666.

SUB-DIVISION 7: 25 Cal. 82; 29 Cal. 156.

§ 431. (§§ 41, 42.) The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time.

Vide § 441.

Instead of the last sentence, stat. 1851, 57, read: § 42 "The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue; or may demur and answer at the same time."

1 Cal. 206, 470, 481; 30 Cal. 666; 31 Cal. 101; 32 Cal. 208

§ 432. (§ 43.) If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments to be served upon the defendants affected thereby. The defendant must answer the complaint, as amended, within such time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

Stat. 1851, 57, read: "If the complaint be amended, the amendments shall be filed, and a copy served upon the defendant or his attorney, if he has appeared by attorney, otherwise a new summons shall issue thereon."

Stat. 1854, 60, read: "If the complaint be amended, a copy as amended shall be filed, and a copy served upon defendant, or his attorney, if he has appeared by attorney. The defendant shall be allowed the same time to answer as upon the service of the original complaint, and judgment by default may be entered upon failure to answer, as in other cases."

Stat. 1855, 196, is, in substance, the above section, 432.

23 Cal. 127; 28 Cal. 673; 30 Cal. 192; 32 Cal. 131.

§ 433. (§ 44.) When any of the matters enumerated in § 430 do not appear upon the face of the complaint, the objection may be taken by answer.

29 Cal. 637; 37 Cal. 183.

§ 434. (§ 45.) If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER IV.

THE ANSWER.

SECTION 437. Answer, what to contain.
438. When counter claim may be set up.
439. When defendant omits to set up counter claim.
440. Counter claim not barred by death or assignment.
441. Answer may contain several grounds of defence. Defendant may answer part and demur to part of complaint.

§ 437. (§ 46.) The answer of the defendant shall contain:

1. If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief: if the complaint be not verified, then a general denial to each of said allegations; but a general denial only puts in issue the material allegations of the complaint.

2. A statement of any new matter in avoidance, or constituting a defence or counter claim.

Stat. 1851, 57, read: "The answer of the defendant shall contain:

"1st—In respect to each allegation of the complaint controverted by the defendant, a general or specific denial thereof, or a denial thereof according to his information and belief, or of any knowledge thereof sufficient to form a belief.

"2d—A statement of any new matter, constituting a defence or counter claim, in ordinary and concise language."

Stat. 1854, 60, was same as above section, 437, omitting the words "in avoidance or counter claim," and adding the words "in ordinary and concise language."

Stat. 1860, 298, was also the same as § 437, down to subdivision 2, for which it substituted the words: "A statement of any new matter or counter claim constituting a defence, in ordinary and concise language. When the answer contains new matter constituting a defence, the plaintiff may, within the same length of time allowed for answering, and subject to the same rules, reply to such new matter; and if he fail to do so, such new matter shall be taken as true, and deemed proved at the trial. If new matter of setoff and counter claim be set up in the answer, the reply may contain matter of setoff and counter claim, not embraced in the complaint. All new matter set up in the replication, shall be deemed denied by the defendant."

Stat. 1862, 562, was same as § 437, omitting the words "in avoidance," and adding the words "in ordinary and concise language."

Stat. 1863-6, 702, was same as § 437, down to subdivision 2, for which it substituted the words: "A statement of matter in avoidance, a counter claim constituting a defence, or the subject matter of cross complaint which may entitle a defendant to relief against the plaintiff alone, or against the plaintiff and a co-defendant."

All the foregoing statutes inserted the words "and express," between "material" and "allegations," in subdivision 1. *Vide* §§ 443, 462.

SUB-DIVISION 1: Specific denial: 4 Cal. 117; 9 Cal. 453; 15 Cal. 638; 18 Cal. 314; 21 Cal. 47; 28 Cal. 170; 31 Cal. 185; 32 Cal. 450, 597; 34 Cal. 39, 153; 36 Cal. 230; 38 Cal. 287, 689.

General denial: 2 Cal. 494, 510; 11 Cal. 69; 14 Cal. 508; 22 Cal. 229; 23 Cal. 401; 32 Cal. 176, 578.

Sufficiency of denial: 9 Cal. 33, 59, 453; 15 Cal. 638; 18 Cal. 433, 461; 22 Cal. 164, 229; 26 Cal. 238; 27 Cal. 476; 28 Cal. 170; 29 Cal. 139, 529; 31 Cal. 185. Fish vs. Redington, 331; 32 Cal. 109; 34 Cal. 62, 161; 35 Cal. 634; 36 Cal. 230.

SUB-DIVISION 2: 1 Cal. 362, 371; 4 Cal. 233; 9 Cal. 74; 10 Cal. 22; 13 Cal. 640; 21 Cal. 11, 47, 430; 30 Cal. 173, 439; 31 Cal. 225; 32 Cal. 620; 40 Cal. 100, 425.

§ 438. (§ 47.) The counter claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action.

Stat. 1860, 299, inserted the words "or plaintiff" after the word "defendant;" the words "or defendant" after the word "plaintiff;" the words "or answer" after the word "complaint;" and the words "or defendant's defence," after the word "claim."

19 Cal. 646; 20 Cal. 277; 23 Cal. 596; 26 Cal. 294

§ 439. (N. S.) If the defendant omit to set up a counter claim in the cases mentioned in the first subdivision of the last section neither he nor his assignee can afterwards maintain an action against the plaintiff therefor.

§ 440. (§ 48.) When cross demands have existed between persons, under such circumstances, that, if one had brought an action against the other, a counter claim could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other; but the two demands must be deemed compensated so far as they equal each other. *But a claim existing in favor of the maker of a negotiable instrument and against a holder after maturity intermediate between the payee and last holder is not a cross demand.*

6 Cal. 452; 22 Cal. 671; 25 Cal. 31; 30 Cal. 192; 32 Cal. 450; 34 Cal. 47; 35 Cal. 360.

§ 441. (§ 49.) The defendant may set forth by answer as many defences and counter claims as he may have. They must be separately stated, and the several defences must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. *The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue.*

CHAPTER V

DEMURRER TO ANSWER.

SECTION 443. When plaintiff may demur to answer.
444. Grounds of demurrer.

§ 443. (§ 50.) The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant.

Stat. 1851, 53, read: "Sham answers and defences may be stricken out, on motion."

Stat. 1854, 63, read: "When the answer contains new matter, the plaintiff may demur to the same for insufficiency, stating in his demurrer the grounds thereof, and he may also demur to one or more of several defences set up in the answer; sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court, in its discretion, may impose."

Stat. 1863, 299, read: "When the answer contains new matter, the plaintiff may, within the number of days in which the defendant is by the summons required to answer, said days to be computed from the time of the service on the plaintiff of such answer, demur to the same for insufficiency, stating in his demurrer the grounds thereof, and he may also, within the same time, demur to one or more defences, set up in the answer, and the defendant may in like manner demur to the plaintiff's replication. Sham and irrelevant answers, replications and defences, and so much of any answer or replication as may be irrelevant, redundant or immaterial, may be stricken out on motion, and upon such terms as the court in its discretion may impose."

Stat. 1862, 562, inserted in stat. 1863, between the words "plaintiff" and "of such answer," the words "of a copy;" and omitted the words "and the defendant may in like manner, demur to the plaintiff's replication;" "replications," and "or replication."

Stat. 1865-66, 702, inserted in stat. 1862, in lieu of words "new matter," the words: "matter in avoidance or a counter claim," and in lieu of words "and he may also, within the same time, demur to one or more of the defences set up in the answer," the words: "and when the answer contains a cross-complaint, the parties against whom relief is therein demanded may demur or answer thereto within the like period;" and in the last sentence in lieu of "answer" the word "pleading."

12 Cal. 622; 15 Cal. 150; 25 Cal. 31; 30 Cal. 560.

§ 444. (§ 50.) The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counter claim have been improp erly joined.

2. That the answer does not state facts sufficient to constitute a defence or counter claim.

3. That the answer is ambiguous, unintelligible or uncertain.

CHAPTER VI.

VERIFICATION OF PLEADINGS.

SECTION 446. Verification of pleadings.
447. Copy of written instrument contained in complaint admitted, unless answer is verified.
448. When defence is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath.
449. Exceptions to rules prescribed by two preceding sections.

§ 446. (§§ 51, 52, 55.) Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, *or when the State, or any officer of the State, in his official capacity, is plaintiff*, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution *or unless an officer of the State, in his official capacity, is defendant.* In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof.

Stat. 1851, 58, (although the same in substance) did not contain the *italicised* words, and read: "prosecution for felony" instead of "criminal prosecution," and added the clause: "or when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the attorney-general in behalf of the State the pleadings need not, in any case, be verified."

Stat. 1860, 299, inserted after the word "answer" the words "and replication;" and added the words "or misdemeanor" after "felony," in stat. 1851.

Stat. 1862, 562, was same as stat. 1851, adding the words "or misdemeanor" after "felony."

The *italicised* words contain the substance of amendment of 1863-'64, 261.

6 Cal. 67, 640; 8 Cal. 570; 9 Cal. 422; 10 Cal. 461; 17 Cal. 253; 19 Cal. 23; 20 Cal. 628; 30 Cal. 192.

§ 447. (§ 53.) When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified.

1 Cal. 153, 411; 4 Cal. 201; 13 Cal. 62; 14 Cal. 112; 31 Cal. 66; 32 Cal. 83.

§ 448. (§ 54.) When the defence to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, five days before the commencement of the term at which the action is to be tried, an affidavit denying the same.

Stat. 1860, 300, instead of the last clause, read: "unless the replication denying the same be verified."

Stat. 1863, 562, restored the section as it stands.

Stat. 1865-'66, 702, added to it the substance of the words contained in section 449.

§ 449. (§ 54.) But the execution of the instruments mentioned in the two preceding sections, is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original.

CHAPTER VII.

GENERAL RULES OF PLEADING.

SECTION 452. Pleadings to be liberally construed.
453. Sham and irrelevant answers, etc., may be stricken out.
454. How to state an account in pleadings.
455. Description of real property in a pleading.
456. Judgments, how pleaded.
457. Conditions precedent, how to be pleaded.
458. Statute of limitations, how pleaded.
459. Private statutes, how pleaded.
460. Libel and slander, how stated in complaint. Not necessary to allege or prove special damages.
461. Answer in such cases.
462. Allegation not denied, when to be deemed true. When to be deemed controverted.
463. A material allegation defined.
464. Supplemental complaint and answer.
465. Pleadings subsequent to complaint must be filed and served.

§ 452. (§ 70.) In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

1 Cal. 94, 167; 3 Cal. 322; 10 Cal. 317; 23 Cal. 673; 30 Cal. 570; 32 Cal. 176, 639; 40 Cal. 33.

§ 453. (§§ 50, 57.) Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

Vide, § 443, and note.

10 Cal. 22; 18 Cal. 385. Green vs. Palmer, 13 Cal. 411; 22 Cal. 566; 28 Cal. 273; 30 Cal. 190, 560; 34 Cal. 161; 40 Cal. 430.

§ 454. (§ 56.) It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a de-

mand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further account, when the one delivered is too general, or is defective in any particular.

1 Cal. 437; 17 Cal. 230; 32 Cal. 231, 634.

§ 455. (§ 58.) In an action for the recovery of real property it must be described in the complaint *with such certainty as to enable an officer upon execution to identify it.*

Stat. 1851, 59, contained the words: "with its metes and bounds," after "described," omitting the *italicised* words.

5 Cal. 40; 6 Cal. 155; 16 Cal. 432; 19 Cal. 300; 21 Cal. 140; 30 Cal. 467.

§ 456. (§ 59.) In pleading a judgment, or other determination of a court officer *or board* it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

Stat. 1851, 59, contained words: "of especial jurisdiction" after "officer," omitting *italicised* words.

12 Cal. 181, 283; 17 Cal. 518; 36 Cal. 117.

§ 457. (§ 60.) In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

6 Cal. 258; 24 Cal. 630; 30 Cal. 486; 35 Cal. 448.

§ 458. (N. S.) In pleading the statute of limitations it is not necessary to state the facts showing the defence, but it may be stated generally that the cause of action is barred by the provisions of section —— (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the code of civil procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

§ 459. (§ 61.) In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage.

Stat. 1851, 59, added the words: "and the court shall thereu take judicial notice thereof."

§ 460. (§ 62.) In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that is was so published or spoken.

34 Cal. 48.

§ 461. (§ 63.) In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

9 Cal. 529; 10 Cal. 371.

§ 462. (§ 65.) Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance *or constituting a defence or counter claim*, must, on the trial, be deemed controverted by the opposite party.

Stat. 1851, 60, substantially same, except the words "or counter claim;" inserting "specifically" before "controverted."

Stat. 1854, 60, inserted the words: "when it is verified" after "complaint;" also, "specifically" before "controverted;" and, in substance omitted: "or counter claim."

Stat. 1860, 300, inserted: "or answer" after "complaint;" "or replication," after "by the answer;" and "in the replication" in lieu of "in the answer;" also, "specifically" before "controverted;" also, omitted "in avoidance," and the words in *italics*.

Stat. 1861, 494, inserted in 1860, the words: "when verified" after "or answer."

Stat. 1862, 563, was, in substance, the above section 462, omitting: "in avoidance," and the words in *italics*.

Stat. 1865-'66, 702, inserted: "or cross-complaint" after "complaint;" "thereto" after "by the answer;" and "the statement of matters in avoidance shall on the trial be deemed controverted by the adverse party," in lieu of the last clause beginning with: "the statement," etc.
8 Cal. 275; 12 Cal. 493; 15 Cal. 638; 19 Cal. 26; 31 Cal. 231; 32 Cal. 450; 34 Cal. 160; 40 Cal. 116.

§ 462. (§ 66.) A material allegation in a pleading is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient.
9 Cal. 499. Green vs. Palmer, 15 Cal. 411.

§ 464. (§ 67.) The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.
Substantially the last sentence of stat. 1865-66, 703-6. *Vide* § 472, *infra*, and note.

§ 465. (N. S.) All pleadings subsequent to the complaint must be filed with the clerk and served upon the adverse party or his attorney.

CHAPTER VIII.

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS.

SECTION 469. Material variances, how provided for.
470. Immaterial variance, how provided for.
471. What not to be deemed a variance.
472. Amendments of course, and effect of demurrer.
473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.
474. Suing a party by a fictitious name, when allowed.
475. No error or defect to be regarded unless it affects substantial rights.

§ 469. (§ 579.) No variance between the allegation in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and thereupon the court may order the pleading to be amended, upon such terms as may be just.

Stat. 1851, 142, read: "A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby."

32 Cal. 11.

§ 470. (N. S.) Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

§ 471. (N. S.) Where, however, the allegation of the claim or defence to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

35 Cal. 191.

§ 472. (§ 67.) Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled and there is no answer filed, the court must allow an answer to be filed. If a demurrer to the answer is overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in section four hundred and sixty-two.

Stat. 1851, 60, read: "After the decision of a demurrer and on the payment of the costs of the same, the defendant may answer."

Stat. 1859, 60, read: "§ 67. After demurrer, and before the trial of issue on demurrer, either party may, within ten days, amend any pleading demurred to of course, and without costs, filing the same as amended, and serving a copy thereof upon the adverse party or his attorney, who shall have ten days to answer or demur thereto, if the pleading be a complaint, or to demur thereto if it be an answer; but a party shall not so amend more than once. When a demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as shall be just, and upon payment of costs, allow the defendant to file an answer. If a demurrer to the answer be overruled, the facts alleged in the answer shall still be considered as denied."

Stat. 1860, 390, inserted in 1854, "reply or demur thereto," in lieu of "or demur thereto if the pleading be a complaint, or to demur thereto if it be an answer;" the words "or answer" after "to a complaint;" the words "or replication" after "is no answer;" the words "allow an answer or replication to be filed," in lieu of "allow the defendant to file an answer;" and the word "replication," in lieu of "answer," in the last sentence whenever it occurs.

Stat. 1862, 563, was substantially that of 1854, omitting the words "if the pleading be a complaint or to demur thereto, if it be an answer."

Stat. 1865-6, 703, is in substance, above section 472, except that it did not provide for an amendment "before answer or demurrer filed;" but it did provide that the copy of the amended pleading should be served "within ten days;" and that the court, upon overruling demurrer to complaint might, "upon terms," allow an answer to be filed; and added the substance of section 464, *supra*.

10 Cal. 410; 12 Cal. 439; 23 Cal. 127; 28 Cal. 245, 668; 30 Cal. 76; 31 Cal. 191; 34 Cal. 167.

§ 473. (§ 68.) The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or

proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this *code;* and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or the judge at chambers, in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

Stat. 1851, 69, omitted the words "and may upon like terms enlarge the time for answer or demurrer" in 5th and 6th lines, and inserted after "code" in 11th line, "or by an order enlarge such time," and omitted the words between "excusable neglect" in 15th line, and "when, from," in 22d line.

Stat. 1853, 276, was same as above section 473, adding to the first sentence the words "or demurrer to an answer file," and omitting all the words between "excusable neglect" and "when, from any cause."

Stat. 1860, 330, was same as above section 473, adding to the first sentence the words "or replication;" and inserting the words "or replication" after "allow an answer;" and omitting all the words between the words "excusable neglect" and "when, from any cause."

Stat. 1865-6, 843-4, is identical with above section 473, adding the words "or demurrer to an answer filed" to the first sentence.

Striking out or adding party: 1 Cal. 172, 175, 191; 2 Cal. 237; 9 Cal. 56; 15 Cal. 9; 13 Cal. 70, 558.

Extending time: 5 Cal. 62.
Amendments: 1 Cal. 167; 3 Cal. 115, 255; 7 Cal.135; 14 Cal. 201; 17 Cal. 285; 18 Cal. 339; 30 Cal. 318; 38 Cal. 158; 40 Cal. 445.
Amendments to complaint: 3 Cal. 75; 5 Cal. 222; 15 Cal. 145; 23 Cal. 78; 27 Cal. 35; 28 Cal. 673; 32 Cal. 339; 37 Cal. 282.
Opening default: 2 Cal. 250; 3 Cal. 130; 4 Cal. 283; 5 Cal. 137, 406; 6 Cal. 99, 173; 7 Cal. 30; 9 Cal. 130 16 Cal. 377; 18 Cal. 455; 19 Cal. 113, 706; 20 Cal. 109, 137; 21 Cal. 263; 23 Cal. 128, 281; 28 Cal. 668, Bailey vs. Taafe: 29 Cal. 72, 422; 30 Cal. 192; 34 Cal. 79; 36 Cal. 288; 37 Cal. 247; 40 Cal. 153.

§ 474. (§ 69.) When the plaintiff is ignorant of the name of a defendant, *he must state that fact in the complaint, and* such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding must be amended accordingly.
2 Cal. 562; 40 Cal. 490.

§ 475. (§ 71.) The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.
20 Cal. 586; 28 Cal. 65, 263; 31 Cal. 383; 32 Cal. 11, 145.

TITLE VII.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I. ARREST AND BAIL.
II. CLAIM AND DELIVERY OF PERSONAL PROPERTY.
III. INJUNCTION.
IV. ATTACHMENT.
V. RECEIVERS.
VI DEPOSIT IN COURT.

CHAPTER I.

ARREST AND BAIL.

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490. Bail, how proceeded against.
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SECTION 494. Qualification of bail.
495. Justification of bail.
496. Allowance of bail.
497. Deposit of money with sheriff.
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499. Substituting bail for deposit.
500. Money deposited, how applied or disposed of.
501. Sheriff, when liable as bail, and his discharge from liability.
502. Proceedings on judgment against sheriff.
503. Motion to vacate order of arrest or reduce bail. Affidavits on motion.
504. When the order vacated or bail reduced.

§ 478. (§ 72.) No person can be arrested in a civil action, except as prescribed in this code.

§ 479. (§ 73.) The defendant may be arrested as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors.

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer; or an officer of a corporation; or an attorney, factor, broker, agent or clerk, in the course of his employment as such; or by any other person in a fiduciary capacity, or for *fraudulent* misconduct or neglect in office, or in a professional employment; or for a wilful violation of duty.

3. In an action to recover the possession of personal property, unjustly detained, when the property, or any part thereof, has been *fraudulently* concealed, removed or disposed of, so that it cannot be found, or taken by the sheriff.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

Stat. 1851, 61, read "start" instead of "depart," added the words: "arising after the passage to this act" after "cases;" and the words: "or where or when the action is for wilful injury to person, to character or to property, knowing the property to belong to another," to the first subdivision.

1 Cal. 345, 433; 3 Cal. 377; 6 Cal. 239; 8 Cal. 87, 619.

§ 480. (§ 74.) An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 481. (§ 75.) The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the county.

2 Cal. 607; 3 Cal. 377; 6 Cal. 57, 318; 10 Cal. 441.

§ 482. (§ 76.) Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least five hundred dollars. The undertaking must be filed with the clerk of the court.

Stat. 1851, 62, inserted between the words "dollars" and "the undertaking," the words: "Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or free holder, within the State, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution."

§ 483. (§ 77.) The order may be made at the time of the issuing of the summons, or at any time afterwards before judgment. It must require the sheriff of the county where

the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending.

Stat. 1851, 62, used the words: "to accompany" instead of "at the time of the issuing of."

§ 484. (§ 78.) The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest.

§ 485. (§ 79.) The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.

§ 486. (§ 80.) The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest.

Stat. 1851, 62, added "as provided in this chapter."

§ 487. (§ 81.) The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

Stat. 1851, 62, inserted "stating their places of residence and occupation" between "sureties" and "to the effect."

§ 488. (§ 82.) At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested.

5 Cal. 93; 8 Cal. 552.

§ 489. (§ 83.) For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority in-

dorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.

6 Cal. 57.

§ 490. (§ 84.) If the bail neglect or refuse to pay the judgment within ten days after they are finally charged an action may be commenced against such bail for the amount of the original judgment.

Stat. 1851, 63, substituted for that portion of the section following the words: "finally charged," the words "judgment against such bail for the amount of such original judgment, may be, by order of the court upon affidavit of such neglect or refusal, entered against the bail."

Stat. 1854, 60, was same as above section 490.

§ 491. (§ 85.) The bail are exonerated by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process.

§ 492. (§ 86.) Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

§ 493. (§ 87.) Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the

latter), before a judge of the court or county judge, or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking.

§ 494. (§ 83.) The qualifications of bail are as follows:

1. Each of them shall be a resident and householder, or freeholder, within the county.

2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify, severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. [*Vide* § 1057.]

§ 495. (§ 89.) For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff.

§ 496. (§ 90.) If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon and cause them to be filed, and the sheriff is thereupon exonerated from liability.

§ 497. (§ 91.) The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody.

§ 498. (§ 92.) The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiv-

ing the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Stat. 1851, 64, contained the words "or transmit" after "deliver" and the words "plaintiff or his attorney" in lieu of "plaintiff's attorney."

§ 499. (§ 93.) If money is deposited, as provided in the last two sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant.

§ 500. (§ 94.) Where money has been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

§ 501. (§ 95.) If, after been arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving bail at any time before judgment.

Stat. 1851, 64, contained: "and justification of" after "giving."

§ 502. (§ 96.) If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency.

§ 503. (§ 97.) A defendant arrested may at any time before the justification of bail apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose

the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

Stat. 1851, 64, contained: "to the plaintiff" after "notice."
1 Cal. 345; 2 Cal. 607; 3 Cal. 377; 6 Cal. 57.

§ 504. (§ 98.) If, upon such application, it appears that there was not sufficient cause for the arrest, the order must be vacated, or if it appears that the bail was fixed too high, the amount must be reduced.

Stat. 1851, 64, contained: "satisfactorily" before the word: "appear" in both instances.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION 509. Delivery of personal property, when it may be claimed.
510. Affidavit and its requisites.
511. Requisition to sheriff to take and deliver the property.
512. Security on the part of the plaintiff and proceedings in serving the order.
513. Exception to sureties and proceedings thereon, or on failure to except.
514. Defendant, when entitled to redelivery
515. Justification of defendant's sureties.
516. Qualification of sureties.
517. Property, how taken, when concealed in building or inclosure.
518. Property, how kept.
519. Claim of property by third person.
520. Notice and affidavit, when and where to be filed.
521. Actions on undertaking.

§ 509. (§ 99.) The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

3 Cal. 469; 11 Cal. 262; 14 Cal. 410; 22 Cal. 139; 27 Cal. 451; 28 Cal 605; 26 Cal. 313, 619; 34 Cal. 645; 36 Cal. 110; 38 Cal. 483, 507.

§ 510. * (§ 100.) Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing—

1. That the plaintiff is the owner of the property claimed (particularly describing it) or is entitled to the possession thereof.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That it has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure.

5. The actual value of the property.

Stat. 1851, 65, contained, "lawfully" before "entitled."

Expressly applied to justices' courts, *vide* § 870.

§ 511. * (§ 101.) The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.

Stat. 1851, 65, used the words: "A judge of the court in which the action is brought or a county judge," instead of "the plaintiff or his attorney," and added after "defendant" the words "and deliver it to the plaintiff upon receiving the undertaking mentioned in the next section."

Stat. 1854, 60-61, is same as above section, 511.

Expressly applied to justices' courts, *vide* § 870.

3 Cal. 469.

§ 512. * (§ 102.) Upon a receipt of the affidavit and notice with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or, if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant.

Stat. 1851, 65, used "order," instead of "notice;" and inserted "to the defendant" after the word "bound."

Stat. 1854, 61, is same as above section, 512.
Expressly applied to justices' courts, *vide* § 870.
3 Cal. 112; 4 Cal. 113; 7 Cal. 390; 8 Cal. 446; 11 Cal. 262; 21 Cal. 274; 24 Cal. 147.

§ 513. * (§ 103.) The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant except to the sureties, he can not reclaim the property as provided in the next section.

Stat. 1851, 65, contained, "as above provided" after "either waived."
Expressly applied to justices' courts, *vide* § 870.

§ 514. * (§ 104.) At any time before the delivery of the property to the plaintiff the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in § 519.

Expressly applied to justices' courts. *vide* § 870.
2 Cal. 522; 7 Cal. 568; 11 Cal. 262.

§ 515. * (§ 105.) The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time; if they, or others in their place,

fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

Stat. 1851, 66, contained, "expressly" before "waived."

Expressly applied to justices' courts, *vide* § 870.

§ 516. * (§ 106.) The qualifications of sureties must be such as are prescribed by this *code*, in respect to bail upon an order of arrest.

Expressly applied to justices' courts, *vide* § 870.

§ 517. * (§ 107.) If the property or any part thereof be concealed in a building or inclosure, the sheriff must publicly demand its delivery; if it be not delivered he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

Expressly applied to justices' courts by § 870. *Vide* §§ 494, 1057.

§ 518. * (§ 103.) When the sheriff has taken property, as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same.

Expressly applied to justices' courts, *vide* § 870

§ 519. * (§ 103.) If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the defendant or his agent is valid against the sheriff unless so made.

Stat. 1851, 66, contained between "sureties" and "and no claim," the words "accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county."

Expressly applied to justices' courts, *vide* § 870.

§ 520. * (§ 110.) The sheriff must file the notice, undertaking and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Stat. 1851, 67, used "order" instead of "notice, undertaking," and added, "or if the clerk reside in another county, shall mail or forward the same within that time."

Stat. 1851, 61, same as § 520,

Expressly applied to justices' courts, *vide* § 870.

§ 521. * (N. S.) In all actions upon undertakings given under the provisions of this chapter, when the merits of the case have not been determined in the trial of the action in which the same was given, the defendants may in their answer set up as a defence such facts, and also the title of the person in whose behalf the undertaking was given, to the property in dispute.

Expressly applied to justices' courts, *vide* § 870.

CHAPTER III.

INJUNCTION.

SECTION 525. Injunction, what is and who may grant it.
526. When it may be granted.
527. At what time it may be granted, and what is required to obtain it.
528. Injunction after answer.
529. Security upon injunction.
530. Order to show cause why injunction should not be granted.
531. Injunction to suspend business of a corporation, how and by whom granted.
532. Motion to vacate or modify injunction.
533. When to be vacated or modified.

§ 525. (§ 111.) An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge, it may be enforced as the order of the court.

1 Cal. 396; 2 Cal. 463, 590; 4 Cal. 31, 67; 6 Cal. 88, 449; 8 Cal. 26, 34, 66, 268, 320; 9 Cal. 77, 607; 10 Cal. 347; 22 Cal. 362, 485; 23 Cal. 84; 34 Cal. 270.

County judge: 6 Cal. 88, 449; 12 Cal. 440; 23 Cal. 464; 27 Cal. 151.

§ 526. (§ 112.) An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste great or irreparable injury to the plaintiff.

3. When it appears during the litigation that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights,

respecting the subject of the action, and tending to render the judgment ineffectual.

3 Cal. 238; 4 Cal. 31; 5 Cal. 119; 6 Cal. 41; 8 Cal. 392; 12 Cal. 105, 440; 13 Cal. 156; 14 Cal. 460, 544; 15 Cal. 107, 127; 18 Cal. 42, 206; 22 Cal. 485; 27 Cal. 433, 643; 29 Cal. 124; 33 Cal. 497; 34 Cal. 14, 272; 35 Cal. 476, 548; 37 Cal. 282; 39 Cal. 292.

§ 527. (§ 113.) The injunction may be granted at the time of issuing the summons, upon the complaint, and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, must show satisfactorily, that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is verified. When granted on the complaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction.

Stat. 1851, 67, contained between the words "verified" and "when granted," the words, "by the oath of the plaintiff, or some one in his behalf, that he the person making the oath has read the complaint, or heard the complaint read, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true."

1 Cal. 296; 12 Cal. 107; 16 Cal. 386; 19 Cal. 34.

Falkinburg vs. Lucy, 35 Cal. 52.

§ 528. (§ 114.) An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

6 Cal. 449; 22 Cal. 362. Falkenberg vs. Lucy, 35 Cal. 52.

§ 529. (§ 115.) On granting an injunction the court or judge must require, except where the people of the state are a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto.

1 Cal. 336; 2 Cal. 245; 3 Cal. 216; 6 Cal. 399; 10 Cal. 347; 12 Cal. 105; 18 Cal. 625; 25 Cal. 169; 28 Cal. 11, 539; 37 Cal. 34.

§ 530. (§ 116.) If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

13 Cal. 585, 588; 15 Cal. 107; 22 Cal. 479.

§ 531. (§ 117.) An injunction to suspend the general and ordinary business of a corporation cannot be granted except by the court or a judge thereof; nor can it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party to the proceeding.

Stat. 1851, 63, omitted the words "or a judge thereof" and "or a managing agent," which were inserted by stat. 1865-6, 703

§ 532. (§ 118.) If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without

§ 529. On granting an injunction the court or judge must require, except where the people of the state are a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. *Within five days after the filing of the undertaking required, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved.* (In effect March 30, 1874.)

CHAPTER IV.

ATTACHMENT.

SECTION 537. Attachment, when and in what cases may issue.
533. Affidavit for attachment, what to contain.
539. Undertaking on attachment.
540. Writ, to whom directed and what to state.
541. Shares of stock and debts due defendant, how attached and disposed of.
542. How real and personal property shall be attached.
543. Attorney to give written instructions to sheriff what to attach.
544. Garnishment, when garnishee liable to plaintiff.
545. Citation to garnishee to appear before a court or judge,
546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs.
547. Perishable property, how sold. Accounts without suit to be collected.
548. Property attached may be sold as under execution, if the interests of the parties require.
549. When property claimed by a third party, how tried.
550. If plaintiff obtains judgment, how satisfied.
551. When there remains a balance due, how collected.
552. When suits may be commenced on the undertaking.
553. If defendant recover judgment, what the sheriff is to deliver.
554 Proceedings to release attachment, before whom taken.
555. Attachment, in what cases it may be released and upon what terms.
556. When a motion to discharge attachment may be made, and upon what grounds.
557. When motion made on affidavit, it may be opposed by affidavit.
558. When writ must be discharged.
559. When writ to be returned.

§ 537. (§ 120.) The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any

judgment that may be recovered, unless defendant give security to pay such judgment, as in this *chapter* provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, which contract is made or is payable in this State, and is not secured by mortgage, lien or pledge upon real or personal property; or, if so secured, that such security has been rendered nugatory by the act of the defendant.

2. In an action upon a contract, express or implied, against a defendant not residing in this State.

Stat. 1851, 63, same in substance, adding "made after the passage of this act" after the word "implied;" also, omitting the words "lien or pledge," "or if so secured that such security has been rendered nugatory by the act of the defendant;" also subdivision 2.

Stat. 1853, 276, same as above section 537, omitting in the first subdivision the words "lien or pledge," and the words "or if so secured that such security has been rendered nugatory by the act of the defendant."

Stat. 1858, 152, was same as above section 537, down to subdivisions, omitting the words "as in this chapter provided," and thereafter read:

"First—Where the debtor is not a resident of this State.

"Second—Where the debtor has absconded or absented himself from his usual place of abode, or is about to abscond or absent himself, so that the ordinary process of law cannot be served upon him.

"Third—Where the debtor conceals himself, so that the ordinary process of law cannot be served upon him.

"Fourth—Where the debtor has removed, or is about to remove, any of his property or effects out of this State to the injury of his creditors, or with the intent to hinder, delay, or defraud them.

"Fifth—Where the debtor has fraudulently conveyed, assigned, or otherwise disposed of, or is about to fraudulently convey, assign, or otherwise dispose of his property or effects with the intent to hinder, delay, or defraud his creditors.

"Sixth—Where the debtor has fraudulently concealed, or is about to fraudulently conceal his property or effects with the intent to hinder, delay, or defraud his creditors.

"Seventh—Where the debtor fraudulently contracted the debt, or incurred the obligation, respecting which the suit is brought."

Stat. 1860, 300, is same as above section 537.

2 Cal. 17; 3 Cal. 206; 6 Cal. 277; 8 Cal. 260, 570; 9 Cal. 262, 533; 14 Cal. 47; 18 Cal. 378; 21 Cal. 230; 23 Cal. 508; 23 Cal. 281; 29 Cal. 359; 32 Cal. 55; 35 Cal. 199.

§ 538. * (§ 121.) The clerk of the court must issue the writ of attachment upon receiving an affidavit by, or on behalf of, plaintiff, showing—

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, over and above all legal set-offs *or* counter claims), upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage, lien or pledge upon real and personal property; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs or counter claims,) and that the defendant is a non-resident of the State; and,

3. That the sum for which the attachment is asked is an actual bona fide existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor or creditors of the defendant.

Stat. 1851, 63, was same as above omitting subdivisions 2 and 3, and the words "lien or pledge" and inserting before "showing," "which shall be filed;" also substituting "was made after the passage of this act; and was made or is payable in this State" instead of "was made or is payable in this State."

Stat. 1853, 277, was same as above section 538, omitting subdivision 3, and the words "lien or pledge," and inserting before "showing," "which shall be filed;" also, "or" for "and," in *italics*.

Stat. 1853, 153, was same as 1851, substituting for subdivision 2 thereof, the words: "That the deponent has good reason to believe, and does believe, that one or more of the causes set forth in the several of the next preceding section actually exists at the time of making the affidavit, reciting the facts upon which such belief is founded."

Stat. 1860, 331, is same as above section 538, inserting before "showing," "which shall be filed."

(*Vide* section 437.)

4 Cal. 195; 7 Cal. 352; 8 Cal. 260; 13 Cal. 434; 18 Cal 152; 25 Cal. 202; 35 Cal. 199.

§ 539. (§ 122.) Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Stat. 1858, 153, inserted words "or if the attachment should be dismissed" between words "judgment" and "the plaintiff will."
Stat. 1860, 301, and stat. 1851, 69, are same as above section 539.
1 Cal. 410; 2 Cal. 251; 7 Cal. 514.

§ 540. (§ 123.) The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be attached; in which case, to take such undertaking. Several writs may be issued at the same time, to the sheriffs of different counties.

Stat. 1860, 315; stat. 1851, 69, omitted the words "or in an amount equal to the value of the property which has been, or is about to be, attached."
29 Cal. 194.

§ 541.* (§ 124.) The rights or shares which the defendant may have in the stock of any corporation or company, together

§ 539. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. *Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment.* (In effect March 30, 1874.)

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein, held by or standing in the name of such other person, naming him, are attached; and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder must index such attachment when filed, in the names both of the defendant and of the person by whom the property is held or in whose name it stands on the records.

3. Personal property, capable of manual delivery, must be attached by taking it into custody.

4. Stock or shares, or interest in stock or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5. Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owning such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, on the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

Stat. 1851, 69, was the same, except the subdivisions, which were as follows:

"1. Real property shall be attached by leaving a copy of the writ with the occupant thereof; or if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county.

2. Personal property, capable of manual delivery shall be attached by taking it into custody.

3. Stock or shares, or interest in stock or shares, of any corporation or company, shall be attached by leaving with the president, or other head of the same, or the secretary, cashier or managing agent thereof, a copy of the writ, and a notice stating the stock or interest of the defendant is attached in pursuance of such writ.

4. Debts and credits and other personal property, not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits, or other personal property, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ."

Stat. 1862, 563, contained the following subdivisions:

"1. Real property standing upon the records of the county, in the name of the defendant, shall be attached, by leaving a copy of the writ with an occupant thereof; or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county.

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, shall be attached by leaving with such person, or his agent, a copy of the writ, and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county, and leaving a copy of such writ and notice with an occupant of such property, or if there be no occupant, by posting a copy thereof in a conspicuous place thereon."

The third, fourth and fifth subdivisions being the same as the second, third and fourth of stat. 1851.

3 Cal. 363; 7 Cal. 162, 549; 11 Cal. 238, 262; 12 Cal. 539; 13 Cal. 335; 17 Cal. 541; 19 Cal. 41; 29 Cal. 312, 359; 34 Cal. 607; 40 Cal. 409.

§ 543. *(§ 126.) Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.

34 Cal. 293.

§ 544. *(§ 127.) All persons having in their possession, or under their control, any credits or other personal property

belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

2 Cal. 33; 3 Cal. 253; 5 Cal. 118, 294; 11 Cal. 342; 21 Cal. 122; 22 Cal. 667; 34 Cal. 601; 35 Cal. 378, 392

§ 545.* (§ 128.) Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Stat. 1855, 197; stat. 1851, 70, omitted the words "or a referee appointed by the court or judge."

3 Cal. 253; 4 Cal. 409; 5 Cal. 118; 6 Cal. 16; 9 Cal. 262; 11 Cal. 342; 34 Cal. 601.

§ 546.* (§ 129.) The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

§ 547. * (§ 130.) If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

§ 548. *; § 654.) Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof, or a county judge, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action.

Stat. 1854, 72, inserting words "in pursuance of the provisions of said act," after the word "attachment."

§ 549. * (131.) If any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in case of a claim after levy upon execution.

8 Cal. 227; 34 Cal. 629.

§ 550. * (§ 132.) If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

8 Cal. 570; 28 Cal. 231; 30 Cal. 114.

§ 551. * (§ 133.) If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

§ 552. * (§ 134.) If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty or section five hundred and fifty-five, or he may proceed as in other cases upon the return of an execution.

6 Cal. 277.

§ 553. * (§ 135.) If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

§ 554. * (§ 136.) Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, or to a county judge, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made, releasing from the operation of the attachment any or all of the property attached, and all of the property so released, and all of the proceeds of the sales thereof, must be delivered

to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

Stat. 1851, 71, same in substance, omitting the words "or to a county judge;" also, "wholly or in part."

Stat. 1854, 61, inserted in stat. 1851, "of to a county judge."

Stat. 1863, 305, same as above section 554.

§ 555. * (§ 137.) Before the making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders or householders in the county, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver the attached property so released, to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by three disinterested persons to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same be required.

Stat. 1851, 72, read: "Upon such application the defendant shall deliver to the court or judge an undertaking executed by at least two sureties, residents and freeholders in the county, to the effect that the sureties will, on demand, pay to the plaintiff the amount of any judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be sufficient to satisfy the amount claimed by the plaintiff in his complaint, and the costs. The sureties may be required to justify, on such application before the judge or court, and the property attached shall not be released from the attachment without their justification, if the same be required."

Stat. 1854, 61, inserted in 1851, the words "or householder;" also words "in favor of the plaintiff" instead of "against the defendant."

Stat. 1863, 305, same as above section 555, inserting "executed by the defendant and" instead of "on behalf of the defendant by."

Stat. 1863–4, 44, same as above section 555.

18 Cal. 339; 26 Cal. 540.

§ 556. * (§ 138.) The defendant may, also, any time before the time for answering expires, apply, on motion, upon reason-

able notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the attachment be discharged on the ground that the writ was improperly or irregularly issued.

Stat. 1851, 72, contained the words "to the judge who made the order, or the court in which the action is brought," instead of "to the court in which the action is brought, or to a judge thereof or to a county judge;" also omitted "or irregularly."

Stat. 1851, 61, omitted words "or irregularly" from above section 556.

Stat. 1858, 153, read: "In all cases where property or effects shall be attached, the defendant, or any creditor of the defendant, interested, may file a plea, in the nature of a plea in abatement, under oath, putting in issue the truth of the facts alleged in the affidavit on which the attachment was sued out."

Stat. 1860, 301, same as above section 556.
10 Cal. 337.

§ 557. * (§ 139.) If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

Stat. 1858, 153, read: "Upon such issue the plaintiff shall be held to prove that the facts alleged by him in said affidavit, as the grounds of the attachment, existed at the time of the issuance of the writ of attachment."

Stat. 1860, 301, and 1851, 72, same as section 557.

§ 558. * (§ 140.) If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.

Stat. 1860, 302.

Stat. 1851, 72, omitted the words "or irregularly."

Stat. 1858, 154, read: "If the issue be found against the plaintiff, the attachment shall be dismissed at the cost of the plaintiff, and his sureties shall thereupon be liable upon the bond for all damages sustained by the defendant, in consequence of the issuing of the attachment."

§ 559. * (§ 141.) The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto.

Stat. 1851, 72, added the words: "The provisions of this chapter shall not apply to any suits already commenced, but so far as such suits may be concerned, the act entitled 'an act to regulate proceedings against debtors by attachment,' passed April 22d, 1850, shall be deemed in full force and effect."

5 Cal. 53; 6 Cal. 85; 8 Cal. 21; 11 Cal. 238.

CHAPTER V.

RECEIVERS.

SECTION 564. Appointment of receiver.
565. Appointment of receivers upon dissolution of corporation.
566. Who shall not be appointed.
567. Oath and undertaking.
568. Powers of receivers.
569. Investment of funds.

§ 564. (N. S.) A receiver may be appointed by the court in which an action is pending, or by the judge thereof—

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

There was no similar provision in statute of 1851.

Stat. 1851, 41-2, read: "§ 143. A receiver may be appointed by the court in which the action is pending, or by a judge thereof:

"1st. Before judgment, provisionally, on the application of either party when he establishes a *prima facie* right to the property, or to an interest in the property (which) is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired.

"2d. After judgment, to dispose of the property according to the judgment, or to preserve it during the pending of an appeal; and,

"3d. In such other cases as are in accordance with the practice of courts of equity jurisdiction."

3 Cal. 383; 5 Cal. 494; 6 Cal. 99, 475; 8 Cal. 336; 13 Cal. 639; 16 Cal. 146; 22 Cal. 191; 25 Cal. 11; 26 Cal. 447; 35 Cal. 476.

§ 565. (§ N. S.) Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members.

This section is a substitute for statute 1850, 347, §§ 16 and 18, and stat. 1862, 199, § 25.

§ 566. (N. S.) No party, or attorney, or person interested in an action, can be appointed receiver therein.

§ 567. (N. S.) Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

Stat. 1851 contained nothing similar.

§ 568. (N. S.) The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to re-

ceive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

Stat. 1851 contained nothing similar.

6 Cal. 475; 306.

§ 569. (N. S.) Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action.

Stat. 1851 contained nothing similar.

CHAPTER VI.

DEPOSIT IN COURT.

SECTION 572. Deposit in court.
573. Money paid to clerk must be deposited with county treasurer.
574. Manner of enforcing the order.

§ 572. (§ 142.) When it is admitted by the pleading, or *shown upon* the examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

§ 573. If the money is deposited in court it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the court. For the safe keeping of the money deposited with him the treasurer is liable on his official bond.

Vide, statute 1863–'64, 468.

§ 574. (N. S.) Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, beside punishing the disobedience, may make an order requiring the sheriff to take the money or thing and deposit or deliver it in conformity with the direction of the court.

TITLE VIII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I. JUDGMENT IN GENERAL.
II. JUDGMENT UPON FAILURE TO ANSWER.
III. ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.
IV. TRIAL BY JURY.
V. TRIAL BY THE COURT.
VI. OF REFERENCES AND TRIALS BY REFEREES.
VII. PROVISIONS RELATING TO TRIALS IN GENERAL.
VIII. THE MANNER OF GIVING AND ENTERING JUDGMENT.

CHAPTER I.

JUDGMENT IN GENERAL.

SECTION 577. Judgment defined.
578. Judgment may be for or against one of the parties.
579. Judgment may be against one party and action proceed as to others.
580. The relief to be awarded to the plaintiff.
581. Action may be dismissed or nonsuit entered.
582. All other judgments are on the merits.

§ 577. (§ 144.) A judgment is the final determination of the rights of the parties in an action or proceeding.

Stat. 1851, 73, added words "and may be entered in term or vacation." 1 Cal. 134; 9 Cal. 173; 12 Cal. 467; 13 Cal. 51; 14 Cal. 117; 18 Cal. 625; 20 Cal. 50; 21 Cal. 151; 27 Cal. 228; 28 Cal. 335; 31 Cal. 273; 33 Cal. 474; Hahn vs. Kelley, 34 Cal. 391; 35 Cal. 530; 36 Cal. 230; 37 Cal. 282, 437, 458; 39 Cal. 629.

Ejectment: 9 Cal. 213; 14 Cal. 465; 18 Cal. 108, 219; 22 Cal. 513, 645; 32 Cal. 176; 35 Cal. 316; 36 Cal. 625; 40 Cal. 297.

Effect of judgments as evidence: See § 1908.

§ 578. (§ 145.) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

1 Cal. 167; 9 Cal. 286; 18 Cal. 399, 402; 28 Cal. 26; 39 Cal. 412. See § 413.

§ 579. (§ 146.) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

28 Cal. 26; 29 Cal. 429.

§ 580. (§ 147.) The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

10 Cal. 299; 11 Cal. 19; 20 Cal. 91, 628; 22 Cal. 633, 651; 27 Cal. 102, 655; 28 Cal. 289, 628; 29 Cal. 165; 30 Cal. 530; 32 Cal. 639; 34 Cal. 76, 79; 37 Cal. 282.

§ 581. (§ 148.) An action may be dismissed or a judgment of nonsuit entered in the following cases:

1. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party, upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court, when, upon the trial, and before the final submission of the case, the plaintiff abandons it.

5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury.

The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

1 Cal. 108, 125, 221; 3 Cal. 185; 4 Cal. 117; 8 Cal. 291; 9 Cal. 268; 13 Cal. 40, 637; 14 Cal. 576; 15 Cal. 387; 18 Cal. 76; 20 Cal. 92, 588; 22 Cal. 109, 463; 23

Cal. 593; 27 Cal. 470; 29 Cal. 147, 264; 31 Cal. 418, 629; 32 Cal. 488; 33 Cal. 111; 39 Cal. 224.

§ 582. (§ 149.) In every case, other than those mentioned in the last section, judgment must be rendered on the merits.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

SECTION 585. In what cases judgment may be had upon the failure of the defendant to answer.

§ 585. (§ 150.) Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in section four hundred and fourteen.

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or

if, to determine the amount of damages, the examination of a long account be involved, by a reference as above provided.

3. In actions, where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

Stat. 1851, 74, used "designated in the order of publication" instead of "for answering;" and "necessary" for "involved."

1 Cal. 94; 2 Cal. 241; 4 Cal. 254; 6 Cal. 173; 9 Cal. 130; 10 Cal. 441, 555; 11 Cal. 250; 14 Cal. 117, 210; 15 Cal. 23; 16 Cal. 381; 17 Cal. 564; 18 Cal. 420; 21 Cal. 425; 27 Cal. 99, 102, 495; 28 Cal. 212, 649, 668; 30 Cal. 92, 192, 202, 530; 31 Cal. 238; 32 Cal. 634; 34 Cal. 25; 35 Cal. 37; 37 Cal. 465; 40 Cal. 439.

CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

SECTION 588. Issue defined, and the different kinds.
589. Issue of law, how raised.
590. Issue of fact, how raised.
591. Issue of law, how tried.
592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.
593. Clerk must enter causes on the calendar, to remain until disposed of.
594. Parties may bring issue to trial.
595. Motion to postpone a trial for absence of testimony, requisites of.
596. In cases of adjournment a party may have the testimony of any witness taken.

§ 588. (§ 151.) Issues arise *upon the pleadings* when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

§ 589. (§ 152.) An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Stat. 1854, 62.

Stat. 1851, 74, omitted "or answer."

§ 590. (§ 153.) An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matters in the answer, except an issue of law is joined thereon.

Stat. 1854, 62.

Stat. 1851, 74, omitted "except an issue of law is joined thereon."

§ 591. (§ 154.) An issue of law must be tried by the court, unless it is referred upon consent.

Stat. 1851, 74, added "as provided in chapter VI of this title."

§ 592. (§ 15[illegible].) An issue of fact must be tried by a jury, unless a jury trial is waived, or a reference be ordered, as pro-

vided in this *code*. Where there are issues both of law and fact, the issues of law must be first disposed of.

Stat. 1851, 74, inserted "to the same complaint," after "law and fact." 6 Cal. 122; 9 Cal. 251; 21 Cal. 425; 23 Cal. 335; 30 Cal. 511; 32 Cal. 208. Equity cases: 4 Cal. 6; 5 Cal. 192; 8 Cal. 501; 16 Cal. 249.

§ 593. (§ 156.) The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, must remain upon the calendar from court to court, until finally disposed of.

§ 594. (§ 157.) Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

§ 595. (§ 158.) A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

1 Cal. 404; 2 Cal. 183, 270; 3 Cal. 185; 6 Cal. 249; 7 Cal. 418; 8 Cal. 89; 9 Cal. 211; 11 Cal. 21, 161; 14 Cal. 358, 419; 17 Cal. 123; 23 Cal. 156; 31 Cal. 95, 218; 32 Cal. 102; 35 Cal. 552; 40 Cal. 468.

§ 596. (§ 664.) The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced.

Stat. 1851, contained no similar provision.

Stat. 1854, 73, is same as 596.

CHAPTER IV.

TRIAL BY JURY.

ARTICLE I. FORMATION OF JURY.
II. CONDUCT OF THE TRIAL.
III. THE VERDICT.

ARTICLE I.

FORMATION OF THE JURY.

SECTION 600. Jury, how drawn.
601. Challenges. Each party entitled to four peremptory challenges.
602. Grounds of challenge.
603. Challenges, how tried.
604. Jury to be sworn.

§ 600. (§ 159.) When the action is called for trial by jury, the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted.

Stat. 1851, 75, read: "When the action is called for trial by jury, the clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff shall summon, under the direction of the court, from the citizens of the county and not from bystanders, so many qualified persons as may be necessary to complete the jury. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three. Such consent shall be entered by the clerk in the minutes of the trial."

37 Cal. 677.

§ 601. (§ 161.) Either party may challenge the jurors, but when there are several parties on either side, they must join in a challenge before it can be made. The challenges are to

individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges.

23 Cal. 375; 37 Cal. 679.

§ 602. (§ 162.) Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this *code* to render a person competent as a juror.

2. Consanguinity or affinity, within the third degree, to any party.

3. Standing in the relation of guardian and ward, master and servant, employer and clerk or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or *surety* on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties, for the same cause of action.

5. Interest on the part of the juror in the event of the action or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7. The existence of a state of mind in the juror evincing enmity against, or bias to, either party.

Stat. 1860, 302, read "being security" for "surety." Stat. 1851, 76, omitted the words "except the interest of a juror as a member or citizen of a municipal corporation."

12 Cal. 483.

SUB-DIVISION 4: 14 Cal. 167; 18 Cal. 108.

SUB-DIVISION 6: 1 Cal. 37; 11 Cal. 68; 16 Cal. 128; 40 Cal. 268.

SUB-DIVISION 7: 5 Cal. 347; 38 Cal. 51.

§ 603. (§ 163.) Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

§ 604. (§ 160.) As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ———, the plaintiff, and ———, defendant, and a true verdict render according to the evidence.

Stat. 1851, 75, inserted "or affirmation" after "oath."

ARTICLE II.

CONDUCT OF THE TRIAL.

SECTION 607. Order of proceedings on trial.
608. Charge to the jury. Court must furnish in writing, upon request, the points of law contained therein.
609. Special instructions.
610. View by jury of the premises.
611. Admonition when jury permitted to separate.
612. Jury may take with them certain papers.
613. Deliberation of jury, how conducted.
614. May come into court for further instructions.
615. Proceedings in case a juror become sick.
616. When prevented from giving verdict, the cause may be again tried.
617 While jury are absent, court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.
618. Verdict, how declared. Form of. Polling the jury.
619. Proceedings when verdict is informal.

§ 607. (N. S.) When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons otherwise directs:

1. The plaintiff after stating the issue and his case, must produce the evidence on his part.

2. The defendant may then open his defence, and offer his evidence in support thereof.

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument.

5. If several defendants, having separate defences appear by different counsel, the court must determine their relative order in the evidence and argument.

6. The court may then charge the jury.

§ 608. (§ 165.) In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge; or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

2 Cal. 39; 6 Cal. 119, 217, 433; 8 Cal. 216, 275, 390; 13 Cal. 599; 16 Cal. 78; 17 Cal. 123; 18 Cal. 376; 19 Cal. 143; 20 Cal. 56, 432; 22 Cal. 42; 23 Cal. 193, 331; 24 Cal. 18, 339; 25 Cal. 197, 470; 29 Cal. 555; 30 Cal. 312, 539, 630; 31 Cal. 115; 32 Cal. 231, 280; 36 Cal. 255, 404; 38 Cal. 362; 39 Cal. 24, 573, 690.

§ 609. (N. S.) Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

2 Cal. 172; 5 Cal. 491; 8 Cal. 67, 390; 13 Cal. 172; 19 Cal. 476, 683; 25 Cal. 460; 27 Cal. 507 30; Cal. 630; 32 Cal. 280; 34 Cal. 108; 35 Cal. 656; 36 Cal. 255; 37 Cal. 154; 40 Cal. 545.

§ 610. (N. S.) When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

§ 611. (N. S.) If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

§ 612. (167.) Upon retiring for deliberation the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

36 Cal, 168.

§ 613. (§ 166.) When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together, in some convenient place, under charge of an officer, until they agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they are agreed upon their verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

Stat. 1851, 76, read: "§ 166. After hearing the charge, the jury may either decide in court, or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon."

§ 614. (§ 168.) After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

5 Cal. 148.

§ 615. (§ 164.) If, after the impanelling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards impanelled.

Stat. 1851, 76, used words "a new jury" instead of "another juror."

§ 616. (§ 169.) In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

§ 617. (§ 170.) While the jury are absent the court may adjourn, from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term discharges the jury.

12 Cal. 483.

§ 618. When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but if no disagreement be expressed, *and neither party requires the jury to be polled*, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out.

Vide § 619 and note.

20 Cal. 69.

§ 619. When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

§§ 618 and 619 contain the substance of sections 171, 172, 173 stat. 1851, 77, except that the latter did not require the verdict to be in writing; and the foreman delivered the verdict in response to the inquiry of the clerk, to which the jury then assented; it also required the clerk to record the verdict immediately, before reading it to the jury.

2 Cal. 183, 284; 3 Cal. 137; 4 Cal. 289; 34 Cal. 663.

ARTICLE III.

THE VERDICT.

SECTION 624. General and special verdicts defined.
625. When a general or special verdict may be rendered.
626. Verdict in actions for recovery of money or on establishing counter claim.
627 Verdict in actions for the recovery of specific personal property.
628. Entry of verdict.

§ 624. (§ 174.) The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented, as that nothing shall remain to the court but to draw from them conclusions of law.

15 Cal. 161; 25 Cal. 479; 38 Cal. 507; 40 Cal. 418.
Special verdicts: 16 Cal. 113; 19 Cal. 101; 23 Cal. 482

§ 625. (§ 175.) In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

Stat. 1851, 78, read: "The court may instruct the jury to find a special verdict; when not so instructed, the verdict shall be general."
Stat. 1854, 62, same as 625.
3 Cal. 396; 4 Cal. 6; 20 Cal. 387; 23 Cal. 489; 27 Cal. 360; 31 Cal. 98.

§ 626. (§ 176.) When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

§ 627. (§ 177.) In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of defendant, they also find that he is entitled to a return thereof, must find the value of the property, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

7 Cal. 563; 8 Cal. 446; 21 Cal. 274; 24 Cal. 147.

§ 628. (§ 178.) Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and *setting out* the verdict *at length*, and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

CHAPTER V.

TRIAL BY THE COURT.

SECTION 631. When and how trial by jury may be waived.
632. Upon trial by court decision to be in writing and filed within twenty days.
633. Facts found and conclusions of law must be separately stated. Judgment on.
634. Findings may be waived, how.
635. Findings, how prepared.
636. Proceedings after determination of issue of law.

§ 631. (§ 179.) Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contract, and with the assent of the court in other actions, in the manner following:

1. By failing to appear at the trial.

2. By written consent, in person or by attorney, filed with the clerk.

3. By oral consent, in open court, entered in the minutes.

The court may prescribe by rule what shall be deemed a waiver in other cases.

2 Cal. 92, 245; 5 Cal. 112, 192, 294; 15 Cal. 23; 16 Cal. 249; 19 Cal. 140; 27 Cal. 248; 30 Cal. 512.

SUB-DIVISION 1: 10 Cal. 178; 14 Cal. 432; 18 Cal. 402.

§ 632. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within *twenty days* after the *cause is submitted for decision, and unless the decision is filed within that time the action must again be tried.*

Vide § 633 and note.

§ 633. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

Stat. 1851, 78, § 180, was in substance, sections 632-3, using "ten," instead of "twenty;" and "trial took place," instead of "cause is submitted for decision;" and omitting the balance of the *italicized* words.

Stat. 1865-'66, 844, read: "Upon a trial of issue of fact by the court, judgment shall be entered in accordance with the finding of the court, and the finding, if required by either party, shall be reduced to writing and filed with the clerk. In the finding filed, the facts found and the conclusions of law shall be separately stated. In such cases no judgment shall be reversed on appeal for want of a finding in writing at the instance of any party who, at the time of the submission of the cause, shall not have requested a finding in writing, and had such request entered in the minutes of the court; nor in cases tried by the court by a commissioner or referee shall the judgment be reversed on appeal for defects in the finding, unless exceptions be made in the court below for a defect in the finding; and in cases of exceptions for defective findings the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specifically and particularly designated; and upon failure of the court to remedy, or when tried by a commissioner or referee, to cause to be remedied, by such commissioner or referee the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the judge as in other cases; *provided*, that such exceptions shall be filed in the court and served on the attorney of the adverse party within five days after receiving from or giving to the adverse party written notice of the filing of the finding; *provided*, that when any cause is tried and submitted upon a written statement of facts, agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts; and in such case, no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement."

See authorities under section 635.

§ 634. (N. S.) Findings of fact may be waived by the several parties to an issue of fact.

1. By failing to appear at the trial.
2. By consent in writing, filed with the clerk.
3. By oral consent in open court, entered upon the minutes.

§ 635. (N. S.) At the time the cause is submitted, the judge may direct either or both of the parties to prepare findings of fact, unless they have been waived, and when so directed, the party must within two days prepare and serve upon his adversary, and submit to the judge such findings, and may within two days thereafter briefly suggest in writing to the judge why he desires findings upon the points included within the findings prepared by himself, or why he objects to findings upon the points included within the findings prepared by his adversary.

The judge may adopt, modify or reject the findings so submitted. If, at the time of the submission of the cause, the judge does not direct the preparation of findings, or if none are prepared and submitted within the time prescribed, or those prepared are rejected, then he must himself prepare the findings.

7 Cal. 238; 8 Cal. 445; 12 Cal. 403; 16 Cal. 103; 19 Cal. 101; 25 Cal. 587; 27 Cal. 119; 28 Cal. 238, 301, 591; 30 Cal. 227, 402; 31 Cal. 154, 211, 242; 33 Cal. 237, 469; 34 Cal. 224, 506; 35 Cal. 30, 346, 556; 36 Cal. 197; 38 Cal. 575, 666; 39 Cal. 262; 40 Cal. 267.

§ 636. (§ 181.) On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section five hundred and eighty-five, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

Stat. 1851, 79, § 181, read: "On a judgment upon an issue of law, if the taking of an account be necessary to enable the court to complete the judgment, a reference may be ordered."

CHAPTER VI.

OF REFERENCES AND TRIALS BY REFEREES.

SECTION 638. Reference ordered upon agreement of parties, in what cases.
639. Reference ordered on motion, in what cases.
640. Number of referees, qualifications, etc.
641. Either party may object. Grounds of objection.
642. Objections, how disposed of.
643. Referees to report within ten days. Effect of. How excepted to, etc.
644. Effect of referees' finding.
645. How excepted to, etc.

§ 638. (§ 182.) A reference may be ordered upon the agreement of the parties filed with the clerk or entered in the minutes:

1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon.

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

Stat. 1865-'6, 845, read "*to proceed and determine the case*" instead of "determine an action or proceeding." Stat. 1851, 79, used the words "proceed and determine the case" instead of "determine an action or proceeding" in subdivision 2; also omitted "finding and."

1 Cal. 336; 2 Cal. 92, 122, 261; 4 Cal. 1; 9 Cal. 353; 20 Cal. 92; 24 Cal. 425; 35 Cal. 549.

§ 639. (§ 183.) When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

ARTICLE I. EXCEPTIONS.
II. NEW TRIALS.

ARTICLE I.

EXCEPTIONS.

SECTION 646. Exceptions may be taken. Time when taken, etc.
647. What deemed excepted to.
648. Exception, form of.
649. Exceptions signed by judge and filed with clerk.
650. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc.
651. Exceptions after judgment, etc.
652. When exception is refused, application to supreme court to prove the same, etc.
653. Proceedings when judge ceases to hold office.

§ 646. Exceptions may be taken by either party to any ruling or decision made by a court or judge, either before or after judgment, in any action or proceeding, but except in the cases provided for in the next section, must be taken at the time the ruling is made.

Vide § 653 and note.

2 Cal. 122; 5 Cal. 339, 149, 478; 7 Cal. 38, 423; 12 Cal. 243; 16 Cal. 184, 533; 18 Cal. 83; 25 Cal. 123; 26 Cal. 265; 28 Cal. 170; 32 Cal. 304; 34 Cal. 581, 682; 35 Cal. 398; 38 Cal. 141.

Exception must be particularly stated: 10 Cal. 32, 267; 12 Cal. 243; 15 Cal. 50; 16 Cal. 248; 18 Cal. 315; 23 Cal. 259; 24 Cal. 171, 398, 458; 25 Cal 123, 619; 34 Cal. 554.

§ 647. The adverse party is deemed to have excepted to the verdict of the jury, or the final decision of the court or referee, to an order granting or refusing a new trial, sustaining or over-

ruling a demurrer, striking out a pleading or any part thereof, granting or refusing a continuance, granting or refusing to change the place of trial, and is also deemed to have excepted to every order, ruling or proceeding made or had in the action or proceeding, either before or after judgment, upon an ex parte application.

Vide § 653 and note.

§ 648. (§ 190.) No particular form of exception is required. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient.

Vide § 653 and note.

§ 649. A bill containing the exception to any ruling may be presented to the judge at the time the ruling is made. It must be conformable to the truth, or be at the time corrected until it is so, and signed by the judge and filed with the clerk.

Vide § 653, and note.

§ 650. If a bill is not presented at the time of the ruling, a bill containing the exceptions, or any of them, relating to any ruling had up to the time of the entry of judgment, may, upon one day's notice to the adverse party, at any time after such ruling is made and within thirty days after the entry of judgment, be presented to the judge and settled, as provided in the preceding section.

Vide § 653 and note.

§ 651. A bill containing the exceptions to any ruling made after judgment, except to a ruling made granting or refusing a new trial, may be presented to the judge at the time of such ruling and be settled as provided in section six hundred and forty-nine; and, if not so presented, may, upon one day's notice, and at any time after and within ten days of such ruling, be presented and settled as in such section provided.

Vide § 653, and note.

§ 652. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same; the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

Vide § 653 and note.

§ 653. If the judge who presided at the trial ceases to hold office before the bill is tendered as settled, he may, nevertheless, settle such bill, or the party may, as provided in the preceding section, apply to the supreme court to prove the same.

Stat. 1851, 80, sections 188, 189, 190, 191, read:

"188. An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties."

"189. The point of the exception shall be particularly stated, and may be delivered in writing to the judge, or if the party require it, shall be written down by the clerk; when delivered in writing, or written down by the clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. When not delivered in writing, or written down as above, it may be entered in the judge's minutes and afterwards settled in a statement of the case, as provided in this act."

"190. No particular form of exception shall be required. The objection shall be stated, with so much of the evidence, or other matter, as is necessary to explain it, but no more; and the whole as briefly as possible."

"191. When a cause has been tried by the court, or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to, on motion for a new trial or on appeal, without any special notice that an exception is taken thereto."

Stat. 1863, 360-1, added to section 189 of statute 1851, the words: "*Provided*, that if the judge shall, in any case, refuse to allow an exception in accordance with the facts, any party aggrieved thereby may petition the supreme court for leave to prove the same, and shall have the right so to do, in such mode and manner and according to such regulations as the supreme court may, by rules, impose."

ARTICLE II.

NEW TRIALS.

SECTION 656. New trial defined.
657. When a new trial may be granted.
658. On what papers moved for.
659. Notice of motion, upon whom served and what to contain
660. Motion to be heard at the time specified, or dismissed.
661. Judge to make statement on decision of the motion. This statement to constitute bill of exception.

§ 656. (§ 192.) A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

§ 657. (§ 193.) The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or any abuse of discretion, by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

Stat. 1862, 38, inserted the words "or questions" after "question;" also "one or more" instead of "one" in subdivision 2.

Stat. 1851, 81, read "misconduct of the jury," omitting the balance of subdivision 2.

SUB-DIVISION 1: 4 Cal. 274; 5 Cal. 57, 137; 9 Cal. 529; 11 Cal. 162; 12 Cal. 483; 14 Cal. 661; 15 Cal. 23; 16 Cal. 80; 20 Cal. 432; 22 Cal. 43, 348; 29 Cal. 257, 492; 35 Cal. 336.

SUB-DIVISION 2: 5 Cal. 44; 6 Cal. 228; 9 Cal. 529; 23 Cal. 40; 25 Cal. 397, 460; 29 Cal. 257.

SUB-DIVISION 3: 1 Cal. 429; 3 Cal. 113; 6 Cal. 228; 7 Cal. 40, 418; 9 Cal. 568; 10 Cal. 523; 11 Cal. 21, 212; 15 Cal. 501; 16 Cal. 85; 17 Cal. 335; 19 Cal. 28; 21 Cal. 307; 22 Cal. 160; 24 Cal. 85, 237; 28 Cal. 325; 29 Cal. 635; 30 Cal. 226; 32 Cal. 203; 38 Cal. 456.

SUB-DIVISION 4: 1 Cal. 180, 429; 3 Cal. 55, 113, 396; 4 Cal. 345; 5 Cal. 342, 399; 6 Cal. 228; 7 Cal. 40, 418; 11 Cal. 194; 16 Cal. 180; 22 Cal. 160, 596; 23 Cal. 243, 419; 24 Cal. 513; 29 Cal. 673; 35 Cal. 41, 684; 36 Cal. 383.

SUB-DIVISION 5: 1 Cal. 33, 410; 2 Cal. 326; 5 Cal. 510; 6 Cal. 681; 8 Cal. 294; 14 Cal. 419; 19 Cal. 28; 20 Cal. 196; 21 Cal. 513; 25 Cal. 460.

SUB-DIVISION 6: 12 Cal. 27, 402, 426; 13 Cal. 620; 16 Cal. 392; 19 Cal. 607; 20 Cal. 48, 520; 21 Cal. 178, 413; 23 Cal. 58, 193; 27 Cal. 228; 29 Cal. 386, 492, 589; 32 Cal. 102, 333, 530, 558; 34 Cal. 506; 35 Cal. 30, 85, 218; 37 Cal. 40; 39 Cal. 407, 565.

SUB-DIVISION 7: 1 Cal. 92, 353; 5 Cal. 342; 13 Cal. 42, 53; 16 Cal. 357, 392; 21 Cal. 215, 230; 22 Cal. 42, 255; 25 Cal. 220, 460, 504; 26 Cal. 455; 29 Cal. 615, 644, 673; 32 Cal. 102, 231; 34 Cal. 554; 37 Cal. 263.

§ 658. When the application is made for a cause mentioned in the fifth, sixth and seventh subdivisions of the last section, it is made upon bills of exception on file; for any other cause it is made upon affidavit. If the application is made upon affidavits, the affidavits of the moving party must be filed with the clerk and served upon the adverse party, within twenty-five days after the verdict or decision is made. The adverse party may file counter affidavits within five days thereafter, and, upon leave of the court or judge, the moving party may within five days file affidavits in rebuttal.

Vide, § 661 and note.

§ 659. The party intending to move for a new trial must, within thirty days after the decision or verdict, file with the clerk and serve upon the adverse party a notice of his inten-

tion, designating therein generally the grounds upon which the motion will be made, and the time and place at which it will be brought on for hearing. The time designated must be not less than ten nor more than twenty days after service of the notice.

Vide, § 661 and note.

§ 660. At the time specified in the notice, or at such other time as the court or judge may adjourn the hearing to, not exceeding ten days, the motion must be heard. If the moving party fail to appear at either time it must be dismissed, and the case will stand as though no motion had ever been noticed or made. If heard by the court or judge, it must be decided within ten days after the hearing.

§ 661. The court or judge deciding the motion must immediately thereafter file with the clerk of the court a statement in writing, under his hand, containing—

1. The name of the court and title of the cause.
2. A reference to all pleadings, papers, bills of exception and affidavits used on the motion.
3. A statement that the pleadings, etc., so referred to are made part of the statement.
4. The decision of the court on the motion.
5. The grounds upon which the decision rests.
6. A statement that the party against whom the decision is rendered excepts to the decision.

And the statement so made and filed constitutes and has all the force and effect of a bill of exception to the order granting or refusing the motion.

Stat. 1851, 80, sections 194, 195, 196, read: "194. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section it shall be made upon affidavit; for any other cause it shall be made upon a statement prepared as provided in the next section."

"195. The party intending to move for a new trial shall give notice of the same within two days after the trial, and shall, within five days after such notice, prepare and file with the clerk the affidavit required by the last section, or a statement of the grounds upon which he intends to rely. If no affidavit or statement be filed within five days after the notice, the right to move for a new trial shall be deemed waived. The statement shall contain so much of evidence, or reference thereto, as may be necessary to explain the grounds taken and no more. Such statement, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be settled by the judge upon notice. On the argument, reference may also be made to

the pleadings, depositions, and documentary evidence on file, and to the minutes of the court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing. Any counter affidavits shall be filed with the clerk one day, at least, previous to the hearing."

"196. The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement."

Stat. 1861, 590, amending section 195, read: "The party intending to move for a new trial shall give notice of the same, as follows: When the action has been tried with a jury, within five days after the rendition of the verdict; and when the action has been tried by the court or a referee, within ten days after receiving written notice of the filing of the findings of the judge, or the report of the referee; and he shall within five days after giving such notice, or within such further time, not exceeding twenty days, as the court, or the judge thereof, may by order grant, prepare and file with the clerk the affidavit required by the last section, or a statement of the grounds upon which he intends to rely. If no affidavit or statement be filed within five days after the notice, or within such further time as the parties may agree upon, or the court or judge thereof may by order grant, the right to move for a new trial shall be deemed waived. The grounds of the motion shall be specifically set forth, and the statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain them, and no more; such statement, when not agreed to by the adverse party, shall be settled by the judge upon notice; when agreed to, it shall be accompanied by the certificate of the parties or their attorneys, that the same has been agreed upon and is correct; and when settled by the judge, the same shall be accompanied with his certificate, that the same has been allowed by him and is correct; on the argument, reference may also be made to the pleadings, depositions and documentary evidence on file, and to the minutes of the court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing; any counter affidavits shall be filed with the clerk one day at least previous to the hearing; the affidavits and counter affidavits, or the statement thus used in connection with such pleadings, depositions and minutes of the court as are read or referred to on the hearing, constitute, without further statement, the papers to be used on appeal from the order granting or refusing the new trial. To identify the affidavits, it shall be sufficient for the judge or clerk to indorse them at the time, as having been read or referred to on the hearing. To identify any depositions or minutes of the court read or referred to on the hearing, it shall be sufficient that the judge designate them in his certificate as having been thus read or referred to."

Stat. 1863–'64, 246, amending section 195, read: "§ 195. The party intending to move for a new trial shall give notice of the same as follows: When the action has been tried by a jury, within five days after the rendition of the verdict, and when the action has been tried by the court or by a commissioner or a referee, within ten days after receiving written notice of the rendering of the decision of the judge, or of the filing of the report of the commissioner or referee, the notice shall designate generally the grounds upon which the motion will be made. Within five days after giving such notice, or within such further time not exceeding twenty days as the court, or judge thereof, or court commissioner may by order grant, the said party shall prepare and file with the clerk the affidavit or statement required by the last section. If no affidavit or statement be filed within five days after the notice, or within such further time as the parties may agree upon, or the court, or judge thereof, or court commissioner may by order grant, the right to move for a new trial shall be deemed waived. When the notice designates as the ground upon which the motion will be made the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law occuring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifi-

cations be made, the statement shall be disregarded. The statement shall contain so much of the evidence or reference thereto as may be necessary to explain the particular points thus specified, and no more. Such statement, when not agreed to by the adverse party, shall be settled by the judge upon notice. When agreed to, it shall be accompanied by the certificate of the parties or their attorneys that the same has been agreed upon and is correct. When settled by the judge, the same shall be accompanied with his certificate that the same has been allowed by him and is correct. On the argument reference may also be made to the pleadings, depositions, and documentary evidence on file, and the minutes of the court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing. Any counter affidavits shall be filed with the clerk one day at least previous to the hearing. The affidavits and counter affidavits, or the statement thus used in connection with such pleadings, depositions, and minutes of the court, as are read or referred to on the hearing, shall constitute, without further statement, the papers to be used on appeal from the order granting or refusing the new trial. To identify the affidavits, it shall be sufficient for the judge or clerk to indorse them at the time as having been read or referred to on the hearing. To identify any depositions or minutes of the court read or referred to on the hearing, it shall be sufficient that the judge designate them in his certificate as having been thus read or referred to."

Stat. 1863, 643, amending section 195, was same as statute 1863-'64, *supra*, inserting "of the filing of the findings of the judge" instead of "the rendering of the decision of the judge," but contained erroneous punctuations.

Stat. 1865-'6, 845, was same as above; stat. 1863-'4, after the words "generally the grounds upon which the motion will be made," but down to said words read as follows:

"The party intending to move for a new trial shall give notice of the same as follows: When the action has been tried by a jury, within five days after the rendition of a verdict; and when tried by a commissioner, referee, or by the court, within ten days after receiving written notice of the filing of the findings of the commissioner, referee, or court, when written findings are filed by the court, or of the rendering of the decision of the court when no findings are filed: *provided*, the decision be rendered in open court, and if rendered at vacation, then within ten days after receiving written notice of the filing thereof; and when amendments are filed to remedy defects in the findings, within ten days after receiving written notice of the filing of such amendments. The notice shall designate generally the grounds upon which the motion will be made."

Stat. 1863, 361, added to section 196 of statute 1851, the words: "and the court or judge granting or refusing a new trial shall state in writing the grounds upon which the same is granted or refused."

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

SECTION 664. Judgment to be entered in twenty-four hours, etc.
665. Case may be brought before the court for argument.
666. When counter claim established exceeds plaintiff's demand.
667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.
668. Judgment book to be kept by the clerk.
669. If a party die after verdict, judgment may be entered, but not to be a lien.
670. Judgment roll, what to constitute.
671. Judgment lien, when it begins and when it expires.
672. Docket, how kept, and what to contain.
673. Docket to be open for inspection without charge.
674. Transcript to be filed in any county, and judgment to become a lien there.
675. Satisfaction of a judgment, how made.

§ 664. (§ 197.) When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

§ 665. (§ 198.) When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

Stat. 1851, 82, added "at the first special term."

§ 666. (§ 199.) If a counter claim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

§ 667. (§ 200.) In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and

damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

Stat. 1863-'64, 637-8, omitted the words: "And in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant, or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint."

Also inserted the words "whether the same be by default or after verdict," after the word "plaintiff," in the last clause.

Stat. 1851, 82, omitted all after the words "withholding the same."

Stat. 1863-'70, 295, inserted after the word "evidence" the words "to the satisfaction of the court, referee or jury by whom the action shall be tried;" also the words "whether the same be by default or after verdict;" after the word "plaintiff," in the last clause.

Replevin: 7 Cal. 568; 9 Cal. 562; 34 Cal. 641; 37 Cal. 507.

Gold coin: 25 Cal. 502, 564; 26 Cal. 420, 581; 27 Cal. 100; 28 Cal. 170, 276; 29 Cal. 273; 32 Cal. 112, 145; 35 Cal. 346.

§ 668. (§ 201.) The clerk must keep, with the records of the court, a book to be called the "judgment book," in which judgments must be entered.

Stat. 1851, 82, read: "§ 201. The clerk shall keep among the records of the court, a book for the entry of judgments, to be called the "judgment book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action."

§ 669. (§ 202.) If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

Vide §§ 686, 1505.

20 Cal. 68; 21 Cal. 443; 29 Cal. 359, 35 Cal. 466.

§ 670. (§ 203.) Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed upon the complaint that the default of the defendant in not answering was entered, and a copy of the judgment.

2. In all other cases, the pleadings, verdict of the jury or finding of the court, commissioner or referee, all bills of exception taken and filed, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties.

Stat. 1851, 87, contained in lieu of subdivision 2, the words: "In all other cases, the summons, pleadings, and a copy of the judgment, and any orders relating to a change of the parties."

Stat. 1862, 119, contained in lieu of subdivision 2, the words: "In all other cases, the summons, pleadings, verdict of the jury or finding of the court, and all bills of exception taken and filed in said action, and a copy of the judgment, and any orders relating to a change of the parties."

Stat. 1865-'66, 346, same as section 670, inserting word "summons" before "pleadings."

6 Cal. 277; 18 Cal. 219; 27 Cal. 107; 28 Cal. 170, 295; 31 Cal. 238; 32 Cal. 172; 34 Cal. 391, (Hahn v. Kelly), 641; 36 Cal. 112; 38 Cal. 15, 458; 40 Cal. 378.

§ 671. (§ 204.) Immediately after filing a judgment roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all the

real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time or which he may afterwards acquire, until the lien expires. The lien continues for two years, unless the judgment be previously satisfied.

6 Cal. 130, 277; 10 Cal. 71; 13 Cal. 79; 14 Cal. 438; 16 Cal. 181, 213, 469; 17 Cal. 471; 25 Cal. 337; 28 Cal. 416, 539; 31 Cal. 395; 37 Cal. 121, 39 Cal. 137, 462.

§ 672. (§ 205.) The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into eight columns, and headed as follows: judgment debtors; judgment creditors; judgment: time of entry; where entered in judgment book; appeals: when taken; judgment of appellate court; satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the defendants must be entered in alphabetical order.

31 Cal. 293; 38 Cal. 398; 39 Cal. 137.

§ 673. (§ 206.) The docket kept by the clerk is open at all times, during office hours, for the inspection of the public, without charge. The clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection.

Stat. 1851, 93, used the words "and it shall be the duty of the clerk to" instead of "the clerk must."

§ 674. (§ 207.) A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time or which he may afterwards, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied.

16 Cal. 463; 23 Cal. 49; 31 Cal. 223.

§ 675. (§ 208.) Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk,

made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor; or by the attorney unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it.

Stat. 1851, 83, used the words "or within one year after the judgment, by the attorney unless a revocation of his authority be previously filed;" instead of "or by the attorney, unless a revocation of his authority is filed."

2 Cal. 507; 8 Cal. 30; 23 Cal. 94; 25 Cal. 539; 32 Cal. 131; 34 Cal. 670; 13 Cal. 79; 22 Cal. 173.

TITLE IX.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I. THE EXECUTION.
II. PROCEEDINGS SUPPLEMENTAL TO THE EXECUTION.

CHAPTER I.

THE EXECUTION.

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§ 681. (§ 209.) The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Stat. 1851, 83, added the words "as prescribed in this chapter."

8 Cal. 512; 22 Cal. 647; 28 Cal. 416; 29 Cal. 227; 30 Cal. 621; 34 Cal. 611; 37 Cal. 11.

682. (§ 210.) The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money,

the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff, substantially as follows:

1. If it be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, *or at any time thereafter;* or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants or trustees, it must require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

4. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, it must also require the sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the sheriff must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal

so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

5. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, rents or profits, recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section.

Stat. 1851, 83-4, contained the words "the name of the parties the judgment," after the words "is filed;" also "of real property," after the words "tenants," in subdivision 2; and "particularly," before "describing it," in subdivision 5; but omitted subdivision 4; also the words "and if made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable."

Stat. 1863-'64, 688-9. was the same as section six hundred and eighty-two, omitting words *italicised* in subdivision 1; inserting words "of real property." after "tenants," in subdivision 2; also word "particularly," before "describing it," in subdivision 5.

3 Cal. 213; 10 Cal. 404, 411, 489; 14 Cal. 138, 232; 16 Cal. 200; 29 Cal. 227; 38 Cal. 372.

Writs of restitution and assistance: 21 Cal. 87; 27 Cal. 295; 29 Cal. 131, 664; 30 Cal. 229; 31 Cal. 133.

§ 683. (§ 212.) The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution book," which book must be indexed with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals

whenever they or any part thereof may be destroyed or mutilated.

Stat. 1865-'66, 703; stat. 1851, 84, omitted all after "roll is filed"
5 Cal. 53; 6 Cal. 85, 277; 11 Cal. 238.

§ 684. (§ 213.) Where the judgment requires the payment of money or the delivery of real or personal property, the same may be enforced by a writ of execution; when it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same; obedience thereto may be enforced by the court, and after a final judgment of partition the court has power to enforce a severance of the possession.

Stat. 1865-'66, 703; stat. 1851, 84, omitted the last clause
1 Cal. 34.

§ 685. (§ 214.) In all cases, other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings.

Stat. 1865-'66, 704; stat. 1851, 85, read: "After the lapse of five years from the entry of judgment, an execution shall be issued only by leave of the court, on motion. Such leave shall not be given, unless it be established by the oath of the party or other proof, that the judgment, or some part thereof, remains unsatisfied and due."

Stat. 1861, 116. repealed statute 1851.
29 Cal. 227; 37 Cal. 11.

§ 686. (§ 215.) Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest.

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

Vide §§ 669, 1505.

Stat. 1851, 85, read: "Notwithstanding the death of a party after the judgment, execution thereon against his property may, upon permission

granted by the probate court, be issued and executed in the same manner, and with the same effect, as if he were still living."

Stat. 1863-'64, 452, read: "Notwithstanding the death of a party after the judgment, execution thereon may be issued, in case of the death of the plaintiff, the same as if he were living, upon the application of his executor, or administrator, or successor in interest, by the court in which the judgment was rendered or exists. And in case of the decease of the defendant, if the judgment be for the recovery of real or personal property, execution may be issued and executed against the property recovered in the same manner and with the same effect as if he were still living."

§ 687. (§ 216.) Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued, at the same time, to different counties.

§ 688. (217.) All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachments. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

Stat. 1862, [568.

Stat. 1851, 85, read: "All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution. Until a levy, property shall not be affected by the execution."

Stat. 1854, 62, read: "All goods, chattels, moneys, and other property, real and personal, of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, shall be liable to execution.

Until a levy, property shall not be affected by the execution.

Shares and interests in any corporation or company, and debts and credits and other property not capable of manual delivery, may be attached in execution in like manner as upon writs of attachment.

Gold dust shall be returned by the officer as so much money collected, at its current value, without exposing the same to sale."

3 Cal. 454; 6 Cal. 195; 7 Cal. 203, 286, 549; 8 Cal. 52; 9 Cal. 137, 143; 10 Cal. 378; 12 Cal. 56, 191, 226; 13 Cal. 15; 19 Cal. 109; 22 Cal. 645; 24 Cal. 419, 474; 32 Cal. 131; 34 Cal. 601; 38 Cal. 649.

§ 689. (§ 218.) If the property levied on be claimed by a third person as his property, the sheriff must summon from his county six persons qualified as jurors, between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff and the witnesses must be paid by the claimant if the verdict be against him; otherwise, by the plaintiff. Each party must deposit with the sheriff, before the trial, the amount of his fees and the fees of the jury, and the sheriff must pay the same to the prevailing party.

Stat. 1851, 83, substituted for the last sentence, the words: "On the trial, the defendant and the claimant may be examined by the plaintiff as witnesses."

8 Cal. 29; 10 Cal. 175, 191; 14 Cal. 49; 24 Cal. 425; 28 Cal. 123; 34 Cal. 633; 39 Cal. 703.

Villa v. Pico, April term, 1871.

Notice and demand: 1 Cal. 160; 6 Cal. 44, 512; 12 Cal. 75; 23 Cal. 359; 26 Cal. 514; 30 Cal. 191; 38 Cal. 584.

§ 690. (§ 219.) The following property is exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, desks and books, to the value of two hundred dollars, belonging to the judgment debtor.

2. Necessary household, table and kitchen furniture belonging to the judgment debtor, including *one sewing machine and one piano, in actual use, in a family, or belonging to a woman;* stoves, stove-pipe and stove furniture, wearing apparel, beds, bedding and bedsteads, and provisions, actually provided for individual or family use, sufficient for one month.

3. The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses or two mules,

and their harness, one cart or wagon, and food for such oxen, horses or mules, for one month; also, all seed grain or vegetables actually provided, reserved or on hand, for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars.

4. Tools or implements of a mechanic or artisan necessary to carry on his trade; *the notarial seal and records of a notary public;* the instruments and chest of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with their scientific and professional libraries; the law *professional* libraries *and office furniture* of attorneys, counsellors *and judges*, and the libraries of ministers of the gospel.

5. The cabin or dwelling or a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen, with their harness; and food for such horses, mules or oxen, for one month, when necessary to be used in any whim, windlass, derrick, car, pump or hoisting gear.

6. Two oxen, two horses or two mules, and their harness; and one cart or wagon, one dray or truck, one coupee, one hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer, habitually earns his living; and one horse, with vehicle and harness, or other equipments used by a physician, surgeon or minister of the gospel, in making his professional visits, with food for such oxen, horses or mules, for one month.

7. Four cows with their sucking calves, and four hogs with their sucking pigs.

8. Poultry, not exceeding in value fifty dollars.

9. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or levy of attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family residing in this state, supported wholly or in part by his labor.

10. *The shares held by a member of a homestead association duly incorporated, not exceeding in value one thousand dollars — if the person holding the share is not the owner of a homestead under the laws of this state.*

11. *All moneys, benefits, privileges or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, made in any company incorporated under the laws of this state, if the annual premiums paid do not exceed five hundred dollars.*

12. All fire-engines, hooks and ladders with the carts, trucks and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state.

13. All arms, uniforms and accoutrements required by law to be kept by any person.

14. All court-houses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court-house, jail and public offices, belonging to any county of this state; and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state; but no article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon.

[*An Act to amend an Act entitled "An Act to regulate proceedings in civil cases in the Courts of Justice of this State," passed April 29th, 1851. Approved April* 1, 1 72.

SECTION 1.—Section two hundred and nineteen of the above entitled Act is amended to read as follows:

§ 219. The following property shall be exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, desks, and books, to the value of *two hundred dollars*, belonging to the judgment debtor.

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including *one sewing machine*, stoves, stove-pipes and stove furniture, wearing apparel, beds, bedding and bedsteads, provisions actually provided for individual or family use sufficient for *three* months, *and two cows and their sucking calves, and food for such cows for one month*.

3. The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses, or two mules, and their harness, four cows with their sucking calves, *five head of hogs, two dozen domestic fowls, one cart or wagon, and food for such oxen, horses, mules, cows, hogs or fowls for one month*; also, all seed grain or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars.

4. The tools or implements of a mechanic or artisan necessary to carry on his trade; *the notarial seal and records of a Notary Public*; the instruments and chest of a surgeon, physician, surveyor or dentist, necessary to the exercise of their profession, with their scientific and professional libraries; the law libraries of attorneys and counselors, and the libraries of ministers of the gospel, *editors, school teachers, and professors of music; also, the musical instruments of a professor of music.*

5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances, necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen, with their harness; and food for such horses, mules, or oxen, for one month, when necessary to be used in any whim, windlass, derrick, car, pump, or hoisting gear; *and also, his mining claim actually worked by him, not exceeding in value the sum of one thousand dollars.*

6. Two oxen, two horses, or two mules, and their harness; and one cart or wagon, one dray or truck, one coupee, one hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one

horse, with vehicle and harness or other equipments, used by a physician, surgeon, or minister of the gospel, in making his professional visits; with food for such oxen, horses or mules, for one month.

7. All fire engines, hooks and ladders, with the carts, trucks, and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state.

8. All arms, uniforms, and accoutrements, required by law to be kept by any person, *and one shot or rifle gun.*

9. All court-houses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court-house, jail and public offices, belonging to any county of this state; and all cemeteries, public squares and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state; but no article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon.

10. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy, execution or levy of attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this state, supported wholly or in part by his labor.

11. *The shares held by a member of a homestead association, duly incorporated, not exceeding in value one thousand dollars, if the person holding the shares is not the owner of a homestead under the laws of this state; all the nautical instruments and wearing apparel of any master, officer or seaman, of any steamer, or other vessel.*

§ 12. This Act shall take effect immediately.

Stat. 1869-'70, 384, omitted the words *italicised* in subdivisions 2, 4, 5, 7, 8, 10 and 11; but inserted in subdivision 3, the portion of subdivision 7, not *italicised*.

Stat. 1863-'64, 523, read "one hundred" instead of "two hundred" in subdivision 1; omitted the *italicised* words in subdivision 2; inserted the words "four cows" between "harness" and "one cart," and the word "cows" between "horses" and "or mules," in subdivision 3; omitted *italicised* words in subdivision 4; omitted the words "one dray, or truck, one coupee, one hack or carriage for one or two horses;" also the words "drayman," "truckman," "hackman," in subdivision 6; also omitted subdivisions 7, 8, 10 and 11.

Stat. 1862, 573, read "one hundred" instead of "two hundred" in subdivision 1; omitted the *italicised* words in subdivision 2; inserted the words "two cows" between "harness" and "one cart," also the word "cows" between "horses" and "or mules" in subdivision 3; omitted the *italicised* words in subdivision 4, and substituted therein for all following the words "their profession," the words "with the professional library, and the law libraries of an attorney and counsellor;" substituted for subdivision 5, the words: "The tent and furniture, including a table, camp stools, bed and bedding of a miner; also, his rocker, shovels, spades, wheelbarrows, pumps and other instruments used in mining, with provisions necessary for his support for one month." Omitted from subdivision 6, the words "one dray, or truck, one coupee, one hack or carriage for one or two horses," also the words "drayman," "truckman," "huckster," "peddler," "hackman," also the words "and harness or other equipments," and the words "or minister of the gospel;" omitted subdivisions 7, 8, 9, 10 and 11. Omitted in subdivision 12, the words "hooks and ladders," "trucks and carriages," "implements," "and all furniture and uniforms;" omitted in subdivision 14, the words "and military organizations," "or for the use of any fire or military company organized under the laws of this state."

Stat. 1854, 62, was the same as stat. 1862, omitting from subdivision 3 thereof, the words following "one month" in subdivision 3, *supra;* also from subdivision 9 thereof, (which corresponded with subdivision 14, *supra);* the words "the fixtures, furniture, books, papers, and appurtenances, belonging and pertaining to the court-house, jail, and public offices."

Stat. 1851, 85, was the same as stat. 1854, omitting in subdivision 3 thereof, the words "two cows;" also subdivisions 7 and 9 thereof, which corresponded with subdivisions 12 and 14, *supra.*

A provision was made by stat. 1863-'64, 92, as follows: "In addition to the property now exempted by law from sale or levy on execution, there shall be exempted one sewing machine, of a value not exceeding one hundred dollars, in actual use by each debtor or the family of the debtor."

A provision was made by stat. 1865-'66, 271, as follows: "The law libraries of federal and state judges of courts of record shall be exempt

from execution in all cases except upon a judgment recovered for the purchase money thereof, or upon a mortgage thereon."

Stat. 1861, 572, § 21, for incorporating homestead associations, read: "The shares held by the members of all associations incorporated under the provisions of this act, together with any amounts of deposits or assessments, shall be exempt from attachment, or sale, on execution for debt, to an extent not exceeding one thousand dollars in such shares, deposits, or assessments, at their par value; *Provided*, the person holding such shares is not the owner of a homestead under the homestead laws of this state."

Stat. 1862, 444, § 10, exempted the seal, registers, and official documents of notaries public.

Stat. 1868, 500, read: "No money, benefit, right, privilege or immunity accruing or in any manner whatever growing out of any life insurance on the life of the debtor, made in any insurance company incorporated under the laws of this state, shall be subject to levy under attachment or execution, or under any original, mesne or final process whatever against such debtor, or to be taken, sequestered or reached by any proceeding supplementary to execution or other like proceeding; *provided*, however, this exemption shall not extend beyond such moneys, benefits, rights, privileges and immunities as have been or might have been secured by the payment of an annual premium not exceeding five hundred dollars."

22 Cal. 508; 39 Cal. 703.
SUB-DIVISION 1: 38 Cal. 384.
SUB-DIVISION 2: 15 Cal. 266; 38 Cal. 384.
SUB-DIVISION 3: 22 Cal. 568; 23 Cal. 78; 38 Cal. 384.
SUB-DIVISION 4: 34 Cal. 302; 38 Cal. 384
SUB-DIVISION 5: 38 Cal. 384.
SUB-DIVISION 6: 5 Cal. 418; 10 Cal. 393; 34 Cal. 302; 38 Cal. 384.
SUB-DIVISION 10: 37 Cal. 97.
SUB-DIVISION 11: 36 Cal. 549; McCullough v. Clark, April term, 1871.

§ 691. (§ 220.) The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment; any excess in the proceeds over the judgment and the sheriff's fees must be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the sheriff's fees, within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate.

Stat. 1851, 86, contained the words "or depositing the amount with the clerk of the court," before "any excess;" also added, "*provided*, that the judgment debtor be present at, and indicate at the time of the levy, such part; and *provided*, that the property indicated be [amply sufficient to satisfy such judgment and fees."

6 Cal. 49, 196; 10 Cal. 487; 38 Cal. 652; 38 Cal. 654.

On personal property: 7 Cal. 549; 12 Cal. 230, 473; 14 Cal. 49; 22 Cal. 100; 25 Cal. 563; 34 Cal. 87.

On real estate: 37 Cal. 130; 38 Cal. 652.

As a satisfaction of judgment: 8 Cal. 30; 32 Cal. 125.

Clark v. Sawyer, April term, 1870.

Kenyon v. Quinn, April term, 1871.

Howe v. Union Insurance Company, January term, 1872.

§ 692. (§ 221.) Before the sale of property on execution, notice thereof must be given, as follows:

1. In case of perishable property: by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property: by posting a similar notice in three public places in the township or city where the sale is to take place, not less than five nor more than ten days successively.

3. In case of real property: by posting a similar notice, particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also when the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper published in the county, if there be one.

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment.

Stat. 1863, 639.

Stat. 1851, 86, omitted subdivision 4, and the words "some" and "published" in subdivision 3.

§ 693. (§ 222.) An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a per-

son wilfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

6 Cal. 47; 22 Cal. 264.

§ 694. (§ 223.) All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

19 Cal. 120; 30 Cal. 591; 34 Cal. 301; 36 Cal. 446; 38 Cal. 377.
Foster v. Coronel, October term, 1867.
McKenzie v. Dickinson, January term, 1872.
Sale of land in gross: 6 Cal. 47; 11 Cal. 20; 21 Cal. 57.
Officer not to become purchaser: 30 Cal. 591.
Statute is directory: 38 Cal. 654.
Sale not affected by return of sheriff: 5 Cal. 56; 6 Cal. 290; 38 Cal. 654.
Sale under void judgment: 8 Cal. 562; 38 Cal. 436

§ 695. (§ 224.) If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, by motion, upon previous notice of five days before any court, or before any justice of the peace, if the same does not exceed his jurisdiction.

5 Cal. 66; 6 Cal. 91; 8 Cal. 25; 9 Cal. 93; 16 Cal. 564; 22 Cal. 512.

§ 696. (§ 225.) Such court of justice must proceed in a summary manner and give judgment, and issue execution therefor forthwith, but the defendant may claim a jury; and the same proceedings may be had against any subsequent purchaser who refuses to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing.

22 Cal. 263, 512.

§ 697. (§ 226.) The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

§ 698. (§ 227.) When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution, or attachment was levied.

Stat. 1851, 67, inserted words "and payment" after "of the sale;" also, "title and interest" after "right;" also "and to" after "had in."

12 Cal. 474.

§ 699. (§ 228.) When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

Stat. 1851, 88, inserted same words in same places as indicated under foregoing section.

18 Cal. 436; 23 Cal. 361; 25 Cal. 557; 29 Cal. 472; 34 Cal. 87.

§ 700. (§ 229.) Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing—

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption, it must be so stated.

And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county.

Stat. 1861-'64, 633.

Stat. 1862, 569, same as above, omitting all the words after subdivision 4, except the last sentence; stat. 1851, 88, omitted the words "the purchaser is substituted, and acquires all the right, title, interest and claim of the judgment debtor thereto;" and also omitted all the words after subdivision 4, except the last sentence.

2 Cal. 596; 4 Cal. 131, 196; 5 Cal. 392; 6 Cal. 173; 9 Cal. 363.

Certificate: 8 Cal. 406; 30 Cal. 137.

Property subject to redemption: 5 Cal. 403; 6 Cal. 173; 9 Cal. 413; 11 Cal. 317; 15 Cal. 526; 16 Cal. 590; 21 Cal. 112, 623; 22 Cal. 650; 23 Cal. 22; 38 Cal. 439; 40 Cal. 237; Middleton v. Guy, October term, 1855, not reported.

SUB-DIVISION 3: 11 Cal. 26.

Title acquired at sale: 9 Cal. 117; 10 Cal. 530; 12 Cal. 133; 14 Cal. 676; 16 Cal. 469; 17 Cal. 56; 21 Cal. 220; 26 Cal. 653; 27 Cal. 299; 30 Cal. 137; 31 Cal. 298, 534; 36 Cal. 397; 38 Cal. 425, 438, 654; Kenyon v. Quinn, April T., 1871, and see citations under § 703.

§ 701. (§ 230.) Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property.

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

Who entitled to redeem: 2 Cal. 407, 596; 4 Cal. 131; 10 Cal. 317, 547; 13 Cal. 577; 14 Cal. 561; 15 Cal. 510, 526; 16 Cal. 590; 21 Cal. 108; 23 Cal. 32; 27 Cal. 371; 28 Cal. 294; 35 Cal. 722; 37 Cal. 135; 38 Cal. 439; 40 Cal. 237.

Vide §§ 346, 347.

§ 702. (§ 231.) The judgment debtor or redemptioner may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with twelve per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest.

Stat. 1860, 302.

Stat. 1851, 83, used "eighteen" instead of "twelve," and omitted the words "other than the judgment under which such purchase was made." Stat. 1859, 139, was same as section 702, substituting for the last clause beginning with the words "and if," the words: "After the sale of any real estate, the judgment under which such sale was had shall cease to be a lien upon such real estate."

11 Cal. 20; 3 Cal. 238; 14 Cal. 54, 563; 17 Cal. 484; 21 Cal. 392; 37 Cal. 135. Payment under protest: 9 Cal. 416; 14 Cal. 240.

§ 703. (§ 232.) If property be so redeemed by a redemptioner, either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the debtor or a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Notice of redemption must be given to the sheriff. If no redemption be made within six months after the sale, the purchaser, or his assignee,

is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, *and* the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale is terminated and he is restored to his estate.

Stat. 1860, 302, same, omitting the *italicised* "and" which is placed after "expired."

Stat. 1851, 88, contained "six" instead of "four;" also words on paying the sum paid on the last previous redemption," after "the last redemption," where they occur the second time; also omitted the words "the judgment under which the property was sold need not be so paid as a lien;" also the words "other than the judgment under which the property was sold;" also, "or his assignee;" also the *italicised* "and" which is placed after "expired."

Stat. 1859, 130, same as above section 703, omitting words "and in addition the amount of any liens held by said last redemtioner prior to his own, with interest; the judgment under which the property was sold need not be so paid as a lien;" also the words "and the amount of any liens other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest;" also the *italicised* "and" which is placed after "expired."

9 Cal. 365; 31 Cal. 300.

Payment of taxes: 17 Cal. 485.

Deed, when to be executed: 21 Cal. 395; 33 Cal. 675; 38 Cal. 438.

Deed, by whom executed: 3 Cal. 266; 6 Cal. 650; 8 Cal. 407; 9 Cal. 103; 12 Cal. 133; 22 Cal. 373.

Mandamus to compel execution of conveyance: 6 Cal. 91; 21 Cal. 111.

Receipts in conveyance: 24 Cal. 414; 25 Cal. 236; 30 Cal. 288; 38 Cal. 658; 40 Cal. 611.

Title acquired by sheriffs' deed: 4 Cal. 357; 9 Cal. 103, 117, 426, 479, 531; 14 Cal. 54; 16 Cal. 471; 26 Cal. 658; 31 Cal. 301; 33 Cal. 438.

Emerson v. Sansome, July T., 1871, and see citations under § 700.

§ 704. (§ 233.) The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

Stat. 1863, 690.

Stat. 1851, 89, omitted the words between "sale" and, "and a tender."

4 Cal. 127; 14 Cal. 232, 661; 17 Cal. 485; 26 Cal. 658; 30 Cal. 137; 38 Cal. 254.

Tender: 37 Cal. 225.

§ 705. (§ 234.) A redemptioner must produce to the officer or person, from whom he seeks to redeem, and serve with his notice to the sheriff—

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder.

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

SUB-DIVISIONS 1 and 2: 14 Cal. 54.

§ 706. (§ 235.) Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

4 Cal. 196; 5 Cal. 392; 13 Cal. 516; 22 Cal. 191.

§ 707. (§ 236.) The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner *or judgment debtor*, before the expiration of the time allowed for such redemption, demands

in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner *or debtor*. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner *or debtor* may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner *or debtor*.

Stat. 1860, 106, added words "or debtor," wherever they occur.

Stat. 1851, 89, omitted all after the word "thereof."

2 Cal. 407; 5 Cal. 392; 7 Cal. 46; 8 Cal. 596; 13 Cal. 516; 18 Cal. 114; 21 Cal. 139, 233; 25 Cal. 354; 30 Cal. 426; 31 Cal. 269, 300; 37 Cal. 431; 38 Cal. 425.

Payment of taxes: 13 Cal. 617; 16 Cal. 471.

Accounting for rents and profits: 17 Cal. 597; 37 Cal. 431.

Not to apply to tax sales: Mayor v. Wards, Jan. T., 1867, not reported.

§ 708. (§ 237.) If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession, in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon, from the time of payment, at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more.

Stat. 1851, 10, substituted for all following the words "judgment creditor," the words: "If the recovery be in consequence of the irregularity in the proceedings concerning the sale, the judgment may, by order of the court, upon notice to the judgment debtor, be revived, and a new

execution issued for the price paid on the sale, with interest. Such judgment shall be a lien on the real estate of the judgment debtor, only from the time of its revival."

Stat. 1863, 303, same as 708, down to the word "bore," inserting "on petition of" instead of "after notice and on motion," and omitting words "in the name of the petitioner;" after the word "bore," the following words: "and when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid, and any other or after acquired property, rents, issues or profits, of the said debtor, shall be liable to levy and sale under execution in satisfaction of such debt; provided, that no property of such debtor sold bona fide before the filing of such petition, shall be subject to the lien of said judgment; and provided, further, that notice of the filing of such petition shall be made by filing a notice thereof, in the recorder's office of the county where such property may be situated; and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest."

16 Cal. 565; 21 Cal. 91; 23 Cal. 362, 630; 24 Cal. 608; 38 Cal. 377.

§ 709. (N. S.) When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

SECTION 714. Debtor required to answer concerning his property, when.
715. Proceedings to compel debtor to appear. It what cases he may be arrested. What bail may be given.
716. Any debtor of the judgment debtor may pay the latter's creditor.
717. Examination of debtors of judgment debtor, or of those having property belonging to him.
718. Witnesses required to testify.
719. Judge may order property to be applied on execution.
720. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.
721. Disobedience of orders, how punished.

§ 714.* (§ 238.) When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or, if he do not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from the judge of the court, or a county judge, requiring such judgment debtor to appear and answer concerning his property, before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

Stat. 1851, 90, added: "when proceedings are taken under the provisions of this chapter."

7 Cal. 201; 28 Cal. 589; 35 Cal. 389; McCullough v. Clark, April T., 1871.

§ 715.* (§ 239.) After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court, or of a judge thereof, or county judge, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment,

such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed, during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking he may be committed to prison.

Stat. 1854, 635; stat. 1851, 90, omitted all after the words, "return of execution."

6 Cal. 16; 7 Cal. 201; 35 Cal. 398.

§ 716. *(§ 240.) After the issuing of an execution against property, *and before its return*, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid.

7 Cal. 201; 26 Cal. 589; 33 Cal. 528; 35 Cal. 398.

§ 717. *(§ 241.) After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

7 Cal. 201; 26 Cal. 589; 35 Cal. 398; 38 Cal. 523.

§ 718. *(§ 242.) Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

26 Cal. 589; 35 Cal. 398; McCullough v. Clark, April T., 1871.

§ 719. *(§ 243.) The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

Stat. 1851, 91, added: "Except that the earnings of the debtor for his personal services at any time within thirty days next preceding the order, shall not be so applied, when it shall be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor."

6 Cal. 16; 7 Cal. 293; 23 Cal. 539; 35 Cal. 398; 38 Cal. 524.

McCullough v. Clark, April T., 1871.

§ 720. *(§ 244.) If it appear that a person or corporation, alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

35 Cal. 398; 38 Cal. 524.

§ 721. *(§ 245.) If any person, party or witness, disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

35 Cal. 398.

Expressly applied to justices' courts by § 905.

such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed, during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking he may be committed to prison.

Stat. 1851, 635; stat. 1851, 90, omitted all after the words, "return of execution."

6 Cal. 16; 7 Cal. 201; 35 Cal. 398.

§ 716.* (§ 240.) After the issuing of an execution against property, *and before its return*, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid.

7 Cal. 201; 26 Cal. 589; 33 Cal. 528; 35 Cal. 398.

§ 717.* (§ 241.) After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

7 Cal. 201; 26 Cal. 539; 35 Cal. 398; 38 Cal. 523.

§ 718. *(§ 242.) Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

26 Cal. 589; 35 Cal. 398; McCullough v. Clark, April T., 1871.

§ 719. *(§ 243.) The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

Stat. 1851, 91, added: "Except that the earnings of the debtor for his personal services at any time within thirty days next preceding the order, shall not be so applied, when it shall be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor."

6 Cal. 16; 7 Cal. 203; 23 Cal. 539; 35 Cal. 398; 38 Cal. 524.

McCullough v. Clark, April T., 1871.

§ 720. *(§ 244.) If it appear that a person or corporation, alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

35 Cal. 398; 38 Cal. 524.

§ 721.* (§ 245.) If any person, party or witness, disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

35 Cal. 398.

Expressly applied to justices' courts by § 905.

5 Cal. 416, 492; 6 Cal. 99; 9 Cal. 123, 385; 16 Cal. 404, 461, 559; 18 Cal. 465; 21 21 Cal. 87; 22 Cal. 116; 23 Cal. 16; 27 Cal. 258, 418, 596; 28 Cal. 226, 520; 29 Cal. 253; 31 Cal. 78; 34 Cal. 548; 36 Cal. 390; Carpentier v. Brenham, 40 Cal. 221.

Decree: 1 Cal. 351; 6 Cal. 173; 9 Cal. 426; 11 Cal. 14; 14 Cal. 156, 640; 16 Cal. 461, 559; 18 Cal. 465; 21 Cal. 76, 103, 589; 23 Cal. 596; 25 Cal. 337; 27 Cal. 418; 29 Cal. 385; 37 Cal. 223; 39 Cal. 304, 504.

Parties: 9 Cal. 123; 10 Cal. 265, 547; 11 Cal. 307; 15 Cal. 483; 16 Cal. 461, 559, 590; 17 Cal. 578; 18 Cal. 690; 21 Cal. 87; 23 Cal. 106; 24 Cal. 379, 505; 25 Cal. 154; 29 Cal. 194, 226; 29 Cal. 253; 33 Cal. 265; 40 Cal. 221.

Redemption: 2 Cal. 387; 9 Cal. 365; 10 Cal. 547; 11 Cal. 307; 16 Cal. 461; 21 Cal. 108; 22 Cal. 330; 23 Cal. 16; 24 Cal. 596; 34 Cal. 648; 35 Cal. 713; 36 Cal. 390; 40 Cal. 62; Carpentier v. Brenham, 40 Cal. 221.

Sale: 10 Cal. 258; 11 Cal. 14; 17 Cal. 626; 24 Cal. 505; 30 Cal. 367, 621.

§ 727. (§ 247.) If there be surplus remaining after payment of the amount due on the mortgage, lien or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

§ 728. (§ 248.) If the debt for which the mortgage, lien or incumbrance is held, is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

15 Cal. 499; 23 Cal. 16.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE AND WILFUL TRESPASS, IN CERTAIN CASES, ON REAL PROPERTY.

SECTION 731. Nuisance defined, and actions for.
732. Waste, actions for.
733. Trespass for cutting or carrying away trees, etc., actions for.
734. Measure of damages in certain cases under the last section.
735. Damages in actions for forcible entry, etc., may be trebled.

§ 731. (§ 249.) Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered.

1 Cal. 462; 3 Cal. 69, 90, 238; 4 Cal. 308; 5 Cal. 120; 6 Cal. 102; 7 Cal. 339; 8 Cal. 77, 312; 24 Cal. 359; 29 Cal. 156, 427; 30 Cal. 379, 520, 573; 31 Cal. 115; 35 Cal. 325; 36 Cal. 193; 39 Cal. 573; 40 Cal. 396, 428.

§ 732. (§ 250.) If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

3 Cal. 383; 5 Cal. 239; 15 Cal. 116; 24 Cal. 467; 32 Cal. 590; 34 Ca

§ 733. (§ 251.) Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public

grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

4 Cal. 184; 6 Cal. 167

§ 734. (§ 252.) Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land, or adjoining it.

§ 735. (§ 253.) If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

5 Cal. 239; 6 Cal. 63; 15 Cal. 149; 25 Cal. 262.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

SECTION 738. Parties to an action to quiet title.
739. When plaintiff cannot recover costs.
740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.
741. When value of improvements can be allowed as a set-off.
742. An order may be made to allow a party to survey and measure the land in dispute.
743. Order, what to contain and how served. If unnecessary injury done, the party surveying to be liable therefor.
744. A mortgage must not be deemed a conveyance, whatever its terms.
745. When court may grant injunction; during foreclosure; after sale on execution, before conveyance.
746. Damages may be recovered for injury to the possession after sale and before delivery of possession.
747. Action not to be prejudiced by alienation, pending suit.
748. Mining claims, actions concerning to be governed by local rules.

§ 738. (§ 254.) An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

Stat. 1851, 92, read: "254. An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

6 Cal. 33; 7 Cal. 319; 14 Cal. 279; 15 Cal. 128, 259; 17 Cal. 149; 21 Cal. 342, 504; 25 Cal. 437; 28 Cal. 194, 615; 30 Cal. 662; 32 Cal. 109, 620; 34 Cal. 563, 568; 35 Cal. 30; 36 Cal. 313; 37 Cal. 282; 39 Cal. 13; 40 Cal. 58.

§ 739. (§ 255.) If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

34 Cal. 563.

§ 740. (§ 256.) In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property

14 Cal. 472; 22 Cal. 513; 30 Cal. 467.

§ 741. (§ 257.) When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

2 Cal. 145; 5 Cal. 319; 8 Cal. 165; 14 Cal. 465; 18 Cal. 694; 28 Cal. 485; 29 Cal. 160, 330; 31 Cal. 487; 35 Cal. 346.

§ 742. (§ 258.) The court in which an action is pending for the recovery of real property, *or for damages for an injury thereto*, or a judge thereof, or a county judge, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, *and of any tunnels, shafts or drifts thereon* for the purpose of the action. *even though entry for such purpose has to be made through other lands belonging to parties to the action.*

Stat. 1860, 304, was the same, omitting the words in *italics*.

Stat. 1851, 93, omitted the *italicised* words; also the words "or a judge thereof or a county judge."

§ 743. (§ 259.) The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.

§ 744. (§ 260.) A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

9 Cal. 365; 14 Cal. 256; 16 Cal. 468; 17 Cal. 589; 21 Cal 609; 22 Cal. 255, 330; 23 Cal. 16; 26 Cal. 595; 27 Cal, 603; 29 Cal. 18, 253.

§ 745. (§ 261.) The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

10 Cal. 258.

§ 746. (§ 262.) When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

§ 747. (§ 233.) An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

§ 748. (§ 621.) In actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations when not in conflict with the laws of this state, must govern the decision of the action.

Stat. 1851, 149, inserted "constitution and" before "laws."

14 Cal. 279, 378; 20 Cal. 199; 26 Cal. 527; 31 Cal. 387; 34 Cal. 30.

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

SECTION 752. Who may bring actions for partition.
753. Interests of all parties must be set forth in the complaint.
754. Lien-holders not of record need not be made parties.
755. Plaintiff must file notice of *lis pendens*.
756. Summons must be directed to all persons interested in the property.
757. Unknown parties may be served by publication.
758. Answer of defendants, what to contain.
759. The rights of all parties may be ascertained in the action.
760. Partial partition.
761. Lien-holders must be made parties, or a referee be appointed to ascertain their rights.
762. Lien-holders must be notified to appear before the referee appointed.
763. The court may order a sale or partition and appoint referees therefor.
764. Partition must be made according to the rights of the parties, as determined by the court.
765. Referees must make a report of their proceedings.
766. The court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive.
767. Judgment not to affect tenants for years to the whole property.
768. Expenses of partition must be apportioned among the parties.
769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.
770. Estate for life or years may be set off in a part of the property not sold, when not all sold.
771. Application of proceeds of sale of encumbered property.
772. Party holding other securities may be required first to exhaust them.

SECTION 773. Proceeds of sale, disposition of.
774. When paid into court the cause may be continued for the determination of the claims of the parties,
775. Sales by referees must be at public auction.
776. The court must direct the terms of sale or credit.
777. Referees may take securities for purchase money.
778. Tenants whose estate has been sold shall receive compensation.
779. The court may fix such compensation.
780. The court must protect tenants unknown.
781. The court must ascertain and secure the value of future contingent or vested interests.
782. Terms of sale must be made known at the time. Lots must be sold separately.
783. Who may not be purchasers.
784. Referees must make a report of the sale to the court.
785. If confirmed, conveyances may be executed.
786. Proceeding if a lien-holder become a purchaser.
787. Conveyances must be recorded, and will be a bar against parties.
788. Proceeds of sale belonging to parties unknown must be invested for their benefit.
789. Investment must be made in the name of the clerk of the county.
790. When the interests of the parties are ascertained, securities must be taken in their names.
791. Duties of the clerk making investments.
792. When unequal partition is ordered, compensation may be adjudged in certain cases.
793. The share of an infant may be paid to his guardian.
794. The guardian of an insane person may receive the proceeds of such party's interest.
795. A guardian may consent to partition without action, and execute releases.
796. Costs of partition a lien upon shares of parceners.
797. The court by consent may appoint a single referee,
798. Expenses of previous litigation for common benefit allowed.
799. Abstract of title in action for partition—when cost of allowed.
800. Abstract, how made and verified.
801. Interest allowed on disbursements made under direction of the court.

§ 752. (§ 264.) When several co-tenants hold and are in possession of real property as parceners, joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

Stat. 1865–66, 704.

Stat. 1851, 93, omitted the words "as parceners;" also "or lives or for years," and inserted "several persons" for "several co-tenants."

Stat. 1851, 63, inserted in stat. 1851, the words "or lives, or for years;" also, "as parceners."

19 Cal. 210; 23 Cal. 501; 26 Cal. 69; 27 Cal. 92, 329; 32 Cal. 289; Gates v. Salmon, 35 Cal. 576; 36 Cal. 112; 38 Cal. 637.

Parol partition: 24 Cal. 218, 268; 27 Cal. 418.

§ 753. (§ 265.) The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

26 Cal. 69; 27 Cal. 329; 40 Cal. 493.

§ 754. (§ 266.) No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

Stat. 1865–66, 704.

Stat. 1851, 94, read: "§ 266. No persons who have or claim any liens upon the property, by mortgage, judgment or otherwise, need be made parties to the action, unless such liens be matters of record."

§ 755. (§ 267.) Immediately after filing the complaint in the district court, the plaintiff must file with the recorder of the county, or of the several counties in which the property is situated, either a copy of such complaint or a notice of the

pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing it shall be deemed notice to all persons.

Stat. 1865-66, 705.

Stat. 1851, 94, omitted the words "in the district court;" also, "or of the several counties;" also, "either a copy of such complaint or".

§ 756. (§ 268.) The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property.

35 Cal. 576.

§ 757. (§ 269.) If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

§ 758. (§ 270.) The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also, whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

Stat. 1851, 94, inserted the word "certified" before "copy," but omitted the words "or who have appeared without such service;" also, "origin" and "original;" also, the words "correctly" and "true."

Stat. 1865-66, 705, same as above section, 758, inserting "correctly" before "state;" also, "true" before "sum."

19 Cal. 210; 27 Cal. 329; 36 Cal. 112.

§ 759. (§ 271.) The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property their rights may be considered together in the action, and not as between themselves.

27 Cal. 329; 32 Cal. 289.

§ 760. (§ 272.) Whenever from any cause it is in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

Stat. 1865–66, 705.

Stat. 1851, 95, read: "§ 272. The plaintiff shall produce to the court, on the hearing of the case, the certificate of the recorder of the county where the property is situated, showing whether there were or not any liens outstanding of record upon the property, or any part thereof, at the time of the commencement of the action."

Stat. 1862, 88, repealed the statute of 1851.

§ 761. (§ 771.) If it appears to the court, by the certificate of the county recorder or county clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding

such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

Stat. 1862, 88.

Stat. 1851, 95, inserted "or claiming" after "holding;" also the words "held by the parties who have appeared and answered" instead of "severally held by such persons and the parties to the action," but omitted the words "to the court;" also, "or the county clerk or by the sworn or verified statement of any person who may have examined or searched the records;" also, "or incumbrances;" also, "upon such real property, or any portion thereof, which existed and were of record;" also, "or not."

§ 762. (§ 274.) The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified or set aside, and a new reference ordered, as the justice of the case may require.

§ 763. (§ 275.) If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it must order a partition, according to the respective rights of the parties, as ascertained by the

court, and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

23 Cal. 501.

§ 764. (§ 276.) In making the partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them.

Stat. 1865-66, 705.

Stat. 1851, 95, omitted the words "pursuant to the provisions of this chapter."

35 Cal. 102.

§ 765. (§ 277.) The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

§ 766. (§ 278.) The court may confirm, change, modify or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent, as if it had been entered before his death.

Stat. 1867-68, 630.

Stat. 1865-66, 705, read: "If no exceptions be filed to the report, or upon hearing they should by overruled, the court shall confirm the same; or it may, upon exceptions, change, modify or set it aside, and refer the matter to the same, or if necessary, may appoint new referees. Upon the report, as confirmed, a final judgment shall be rendered to the effect that such partition be effectual and valid forever, which judgment shall be binding and conclusive:

"First—On all persons named in the complaint as parties to the action, or who shall have appeared therein, and their legal representatives who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the termination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years or for life.

"Second—On all persons interested in the property who may be unknown, to whom notice shall have been given of the action by publication.

"Third—On all persons claiming from such parties or persons, or either of them; and to that end the action shall be deemed and is hereby declared to be a proceeding *in rem*. A copy of the report of the referee, as confirmed, together with a copy of the final judgment therein rendered, duly certified, may be filed in the office of the county recorder of the county or counties in which the land is situated, whose duty it shall be to record the same, which filing and recording shall have the same force and effect as the filing and recording of a deed of conveyance; and,

"Fourth—On all persons who have or claim to have conveyances to, liens upon, or any interest in the property, where such conveyances, liens or interest did not appear of record at the time of the commencement of proceedings for partition."

Stat. 1851, 96, omitted the words "change, modify;" also the last sentence of subdivision 3, commencing "and no judgment."

32 Cal. 289; Gates v. Salmon, 35 Cal. 576.

Appeal: 28 Cal. 637.

§ 767. (§ 279.) The judgment does not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

§ 768. (§ 280.) The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed *by the court, in its discretion*, to the referees, must be apportioned among the different parties to the action, equitably.

Stat. 1865-66, 706.

[§ 280. The expenses of the Referees, including those of a Surveyor and his assistant when employed, shall be ascertained and allowed by the Court, and the amount thereof, together with the fees allowed *by law* to the Referees, *and such attorneys' fees expended for the common benefit, both for plaintiff and defendants, as the Court shall deem just and proper*, shall be apportioned among the different parties to the action.—*Amendment of March* 4, 1872, *Stat.* 1871-2, *p.* 230.]

§ 769. (§ 281.) When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must be first charged with its just proportion of the costs of the partition, in preference to such lien.

§ 770. (§ 282.) When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

§ 771. (§ 283.) The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action,

2. To pay the costs of the reference.

3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.

4. The residue among the owners of the property sold, according to their respective shares therein.

§ 772. (§ 284.) Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

§ 773. (§ 285.) The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

§ 774. (§ 286.) When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

§ 775. (§ 287.) All sales of real property, made by referees under this chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge or lien, that must be stated in the notice.

§ 776. (§ 283.) The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants or parties out of the state.

§ 777. (§ 239.) The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the county and his successors in office.

Stat. 1854, 64.

Stat. 1951, 97, read "clerk of the court" for "clerk of the county."

§ 778. (§ 290.) The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

§ 779. (§ 291.) If such consent be not given, filed and entered, as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate; and must order the same to be paid to such party, or deposited in court for him, as the case may require.

§ 780. (§ 292.) If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

§ 781. (§ 293.) In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured or paid over, in such manner as to protect the rights and interests of the parties.

35 Cal. 576.

§ 782. (§ 294.) In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

§ 783. (§ 295.) Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

§ 784. (§ 296.) After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county where the property is situated.

§ 785. (§ 297.) If the sale be confirmed by the court an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

§ 786. (§ 298.) When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

§ 787. (§ 299.) The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them.

§ 788. (§ 300.) When there are proceeds of a sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same must be invested in *bonds of this state or of the United States*, for the benefit of the persons entitled thereto.

Stat. 1851, 99, inserted "securities on interest" instead of *italicized* words.

§ 789. (§ 301.) When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

§ 790. (§ 302.) When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk.

§ 791. (§ 303.) The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must *deposit with the county treasurer* all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Stat. 1851, 99, inserted "file in his office" instead of *italicized* words.

§ 792. (§ 304.) When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge

compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases, the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

Stat. 1865-66, 706.

Stat. 1851, 99, inserted "by judgment" after "ordered;" and omitted the last sentence.

§ 793. (§ 305.) When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale, to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

§ 794. (§ 306.) The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property, from the referees, on executing, with sufficient sureties, an undertaking approved by a judge of the court, or by a county judge, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

§ 795. (§ 307.) The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the court.

§ 796. (§ 308.) The costs of partition, including *reasonable counsel fees expended by the plaintiff for the common benefit*, fees of referees and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. [See amendment March 4, '72 following § 801.]

§ 797. (§ 309.) The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

§ 798. (N. S.) If it appears to the court that other actions or proceedings have been prosecuted or defended by any of the tenants in common, for the protection, confirmation, or perfecting of the title or settling the boundaries, or making a survey or surveys of the estate partitioned, the court must allow to the parties who have paid the expense of such necessary litigation or other proceedings all the expenses necessarily so incurred therein, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the expenditures; and the same must be allowed and taxed and included in the final judgment as costs are allowed, taxed and included in the judgment.

§ 799. (N. S.) If it appears to the court, that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties

to the action, must be allowed and taxed; whenever such abstract is produced by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made and is subject to the inspection and use of all the parties to the action designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action, with the clerk of the court, stating who is making the same, and where it will be kept when finished. The court or the judge thereof may direct from time to time, during the progress of the action, who shall have the custody of the abstract.

§ 800. (N. S.) The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct, but the same may be corrected from time to time if found incorrect, under the direction of the court.

§ 801. (N. S.) Whenever during the progress of the action for partition, any disbursements shall have been made, under the direction of the court, or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

[*Act approved March* 4, 1872, *amended* § 308 *as follows:*

§ 308. The costs of partition, including fees of referees, and *such attorneys' fees expended for the common benefit both for plaintiffs and defendants, as the court shall deem just and proper*, and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the court may require the expense of such li igation to be paid by the parties thereto, or any of them. —*Took effect immediately.*]

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

SECTION 802. Certain writs abolished.
803. Action may be brought against any party usurping, etc., any office or franchise.
804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.
805. Judgment may determine the rights of both incumbent and claimant.
806. When rendered in favor of applicant.
807. Damages may be recovered by successful applicant.
808. When several persons claim the same office, their rights may be determined by a single action.
809. If defendant found guilty, what judgment to be rendered against him.

§ 802. (N. S.) The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions, under the provisions of this chapter.

§ 803. (§ 310.) An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

3 Cal. 167; 7 Cal. 432; 10 Cal. 376; 14 Cal. 43; 20 Cal. 50.

§ 804. (§ 311.) Whenever such action is brought, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a justice of the supreme court, or a district judge, for the arrest of such defendant, and holding him to bail; and thereupon he may be arrested and held to bail, in the same manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

7 Cal. 393, 432; 14 Cal. 43; 16 Cal. 358.

§ 805. (§ 312.) In every such action, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require.

27 Cal. 470; 28 Cal. 382.

§ 806. (§ 313.) If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office.

§ 807. (§ 314.) If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant.

§ 808. (§ 315.) When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 809. (§ 316.) When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise or

privilege, judgment must be rendered that such defendant be excluded from the office, franchise or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state.

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS AND BOATS.

SECTION 813. When vessels, etc., are liable. Their liabilities constitute liens.
814. Actions may be brought directly against such vessels, etc.
815. Complaint must be verified.
816. Summons may be served on the master, mate, etc.
817. Plaintiff may have such vessel, etc., attached.
818. The clerk must issue the writ of attachment.
819. Such writ must be directed to the sheriff. Sheriff may release upon sufficient undertaking.
820. Sheriff must execute such writ without delay.
821. The owner, master, etc., may appear and defend such vessel.
822. Proceedings in actions under this chapter.
823. After appearance attachment may, on motion, be discharged.
824. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds.
825. Mariners and others may assert their claim for wages, notwithstanding prior attachment. How enforced.
826. Proof of the claims of mariners and others.
827. Sheriff's notice of sale to contain measurement, tonnage, etc.

§ 813. (§ 817.) All steamers, vessels and boats are liable:

1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents or consignees.

2. For supplies furnished for their use at the request of their respective owners, masters, agents or consignees.

3. For materials furnished for their construction, repair or equipment.

4. For their wharfage and anchorage within this state.

5. For injuries committed by them to persons or property.

The several causes of action constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.

Stat. 1851, 101, added to subdivision 5, the words "Provided, that the wages of mariners, boatmen, and others employed in the service of such steamers, vessels and boats, shall have preference over all other demands." Also inserted a subdivision between 4 and 5, as follows: "For non-performance or malperformance of any contract for the transportation of persons or property, made by their respective owners, masters, agents or consignees;" and also omitted the last sentence, commencing "the several causes."

Stat. 1860, 304, was same as above section 813 inserting between 4 and 5 the subdivision of 1851 last recited *supra*.

4 Wallace, 411, (The Moses Taylor), 556; 1 Cal. 485; 2 Cal. 308; 5 Cal. 268; 6 Cal. 462; 8 Cal. 418; 9 Cal. 697; 13 Cal. 369; 18 Cal. 526; 34 Cal. 676.

§ 814. (§ 318.) Actions for damages arising upon any of the grounds specified in the preceding section may be brought directly against such steamers, vessels or boats.

Stat. 1851, 102, used "demands" instead of "damages."

§ 815. (§ 319.) The complaint must designate the steamer, vessel or boat by name, and must be verified by the oath of the plaintiff, or some one on his behalf.

§ 816. (§ 320.) The summons, attached to a certified copy of the complaint, may be served on the master, mate or person having charge of the steamer, vessel or boat against which the action is brought.

Stat. 1851, 102, inserted "any" before "person."

2 Cal. 308, 310.

§ 817. (§ 321.) The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel or boat against which the action is brought, with its tackle, apparel and furniture, attached as security for the satisfaction of any judgment that may be recovered therein.

7 Cal. 405; 8 Cal. 418.

§ 818. (§ 322.) The clerk of the court must issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if judgment be rendered in favor of the steamer, vessel or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages that may be sustained by such steamer, vessel or boat from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars when the attachment is issued against a steamer or vessel, or less than two hundred dollars when issued against a boat.

Stat. 1851, 102, added: "The undertaking shall be accompanied by an affidavit of each of the sureties, that he is a resident and freeholder or householder of the county, and worth double the amount specified in the undertaking, over and above all his just debts and liabilities. The clerk shall file the undertaking and affidavits."

§ 819. (§ 323.) The writ must be directed to the sheriff of the county within which the steamer, vessel or boat lies, and direct him to attach such steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged in due course of law, unless the owner, master, agent or consignee thereof give him security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, besides costs; in which case, to take such undertaking.

Stat. 1851, 102, inserted "which shall be specified in the writ" between words "suit" and "besides."
1 Cal. 165.

§ 820. (§ 324.) The sheriff to whom the writ is directed and delivered must execute it without delay, and must, unless the undertaking mentioned in the last section is given, attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture, until discharged in due course of law; but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel or boat, or with the removal of any trunks or other property of passengers, or of the captain,

mate, seamen, steward, cook or other persons employed on board.

§ 821. (§ 325.) The owner, master, agent or consignee of the steamer, vessel or boat against which the action is brought may appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on the behalf of the plaintiff, and may require sureties to justify, as in actions against individuals upon bail on arrest.

§ 822. (§ 326.) All proceedings in actions under the provisions of this chapter must be conducted in the same manner as in actions against individuals, except as otherwise herein provided; and in all proceedings subsequent to the complaint, the steamer, vessel or boat may be designated as defendant.

§ 823. (§ 327.) After the appearance in the action of the owner, master, agent or consignee, the attachment may, on motion, be discharged in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provisions of section eight hundred and twenty-five.

2 Cal. 308.

§ 824. (§ 328.) If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:

1. When the action is brought for demands other than the wages of mariners, boatmen and others employed in the service of the steamer, vessel or boat sold, to the payment of the amount of such wages, as specified in the execution.

2. To the payment of the judgment and costs, including his fees.

3. He must pay any balance remaining to the owner, master, agent or consignee, who may have appeared in the action; or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto.

§ 825. (§ 329. Any mariner, boatman or other person employed in the service of the steamer, vessel or boat attached, who may wish to assert his claim for wages against the same, the attachments being issued for other demands than such wages, may file an affidavit of his claim, setting forth the amount and the particular service rendered, with the clerk of the court; and thereafter no attachment can be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined, as provided in the next section, be covered thereby in addition to the other requirements; and any execution issued against such steamer, vessel or boat, upon judgment recovered thereafter, must direct the application of the proceeds of any sale:

1. To the payment of the amount of such claims filed, or the amount determined, as provided in the next section, which amount the clerk must insert in the writ.

2. To the payment of the judgment and costs and sheriff's fees, and must direct the payment of any balance to the owner, master, or consignee who may have appeared in the action; but if no appearance by them be made therein, it must direct a deposit of the balance in court.

§ 826. (§ 330.) If the claim of the mariner, boatman or other person, filed with the clerk of the court, as provided in the last section, be not contested within five days after notice of the filing thereof, by the owner, master, agent or consignee of the steamer, vessel or boat, against which the claim is filed, it is deemed admitted; but if contested, the clerk must indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest; and must immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the clerk or referee may be reviewed by the county judge, either in term or vacation, immediately after the same is given, and the judgment of the county judge is final. On the review, the county judge may use the minutes of the proofs taken by the clerk or referee, or may take the proofs anew.

2 Cal. 370.

§ 827. (§ 331.) The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel or boat, and a general description of her condition.

Stat. 1851, 104, added as section 332, the following: "From orders and judgments under this chapter, an appeal may be taken by the owner, master, agent, or consignee, on the same terms and conditions as appeals in actions against individuals."

TITLE XI.

OF PROCEEDINGS IN JUSTICES' COURTS.

CHAPTER I. PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.
II. MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.
III. PLEADINGS IN JUSTICES' COURTS
IV. PROVISIONAL REMEDIES IN JUSTICES' COURTS.
V. JUDGMENT BY DEFAULT IN JUSTICES' COURTS.
VI. TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.
VII. TRIALS IN JUSTICES' COURTS.
VIII. JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.
IX. EXECUTIONS FROM JUSTICES' COURTS.
X. CONTEMPTS IN JUSTICES' COURTS.
XI. DOCKETS OF JUSTICES.
XII. GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.

SECTION 832. Action, in what township or city may be commenced.
833. Place of trial may be changed in certain cases.
834. Limitation on the right to change.
835. To what court transferred.
836. Proceedings after order changing place of trial.
837. Effect of an order changing place of trial.
838. Transfer of cases to the district court.

2. When either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice or bias of the justice.

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township or city against him.

4. When, from any cause, the justice is disqualified from acting.

5. When the justice is sick or unable to act.

Stat. 1851, 143, read: "Upon the return day of the summons, if a jury be required, or if the justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows:

"1st. When a party who is not a resident of the county is in attendance, the adjournment not to exceed twenty-four hours; when the defendant in attendance is under arrest, the adjournment not to exceed three hours.

"2d. In other cases not to exceed five days. If the trial be not adjourned, it shall take place immediately upon the return of the summons, or immediately after the termination of a pending trial."

Stat. 1853, 279, read: "If at any time before the trial it appear, to the satisfaction of the justice before whom the action is brought, by affidavit (f either party, that such justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice or bias of the justice, the action shall be transferred to some other justice of the same or neighboring township; and in case a jury be demanded, and affidavit of either party is made, that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action shall be transferred to some other justice of the peace in the county. The justice to whom an action may be transferred by the provisions of this section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The justice ordering the transfer of the action to another justice, shall immediately transmit to the latter, on payment of costs, all the papers in the action, together with a certified transcript from his docket, of the proceedings therein.

"Upon the return day of the summons, if a jury be required, or if the justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows:

"1st. When a party who is not a resident of the county is in attendance, the adjournment not to exceed twenty-four hours: when the de-

fendant in attendance is under arrest, the adjournment not to exceed three hours.

"2d. In other cases not to exceed five days."

Stat. 1863, 502, same as 1853, inserting words: "But only one transfer shall be allowed to either party" between the words "in the county" and "The justice;" also "by party applying" between "payment" and "of costs;" also, "all the" before "costs;" also "that have accrued" between "costs" and "all;" and substituting for last sentence and two subdivisions, the following, beginning with the words "upon the return day," etc.: "The justice to whom the case is transferred shall issue a notice, stating the time and place when and where the trial will take place, which notice shall be served upon the parties by any officer authorized to serve process in a justices' court, or by any person specially deputized by the justice for that purpose, at least one day before the trial."

5 Cal. 507; 22 Cal. 34.

§ 834. The place of trial cannot be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second and third subdivisions of the preceding section.

Vide § 833 and notes.

§ 835. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justices' court in the same county.

Vide § 833 and notes.

§ 836. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein.

2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial.

Vide § 833 and notes.

§ 837. From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court.

Vide § 833 and notes.

§ 838. (§ 581.) The parties to an action in a justices' court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, nor can any issue presenting such question be tried by such court; and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if *any of* the pleadings are oral, a transcript of the same, from his docket to *the clerk of* the district court of the county; and from the time of filing such pleadings or transcript with the clerk, the district court has, over the action, the same jurisdiction as if it had been commenced therein.

Stat. 1863-64, 117, substantially same as § 838, substituting "said justice" for "such court;" also omitting the words "the clerk of" in *italics* and inserting the words "from the plaintiff's own showing on the trial, or," between "appear" and "from the answer;" also "county" between "with the" and "clerk."

Stat. 1851, 143, was in substance same as § 838, omitting the words "or possession;" also "or the legality of any tax, impost, assessment, toll or municipal fine," and inserting the words "from plaintiff's own showing on the trial, or" between "appear" and "from the answer;" also words "or that of his agent or attorney" between "oath" and "that the determination;" also "county" between "with the" and "clerk;" adding also the words: "Provided, that when the pleadings or transcript are certified to the district court upon the answer of the defendant, he shall file an undertaking with two or more sufficient sureties, to be approved by the justice, to the effect that they will pay all costs of the action, if it be decided against him by the district court."

17 Cal. 67; 24 Cal. 61; 31 Cal. 140.

CHAPTER II.

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.

SECTION 839. Actions, how commenced.
840. Summons may issue within a year.
841. Defendant may waive summons.
842. Parties may appear in person or by attorney.
843. When guardian necessary, how appointed.
844. Summons, how issued, directed, and what to contain.
845. Time for appearance of defendant.
846. Alias summons.
847. Same.
848. Summons, limitation upon time of service.
849. Summons, by whom and how served and returned.
850. Hour for appearance.

§ 839. (§ 538.) An action in a justices' court is commenced by filing a complaint and issuing a summons thereon, or by the voluntary appearance and pleading of the parties.

Stat. 1851, 135, inserted "a copy of the account, note, bill, bond, or instrument upon which the action is brought, or a concise statement in writing of the cause of action" instead of "a complaint;" also added the words "without summons, in the latter case the action shall be deemed commenced at the time of appearance."

Stat. 1869-70, 637, inserted in 1851, the words "within one year after the filing of the same," between "thereon" and "or."

§ 840. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

Vide § 839 and note.

§ 841. At any time after the complaint is filed the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

Vide § 839 and note.

§ 842. (§ 534.) Parties in justices' courts may appear and act in person or by attorney; and any person, except the con-

stable by whom the summons or jury process was served, may act as attorney.

Stat. 1851, 134, read: "Parties in justices' courts may prosecute or defend in person, or by attorney; and any person, on the request of a party, may act as his attorney, except that the constable by whom the summons or jury process was served, shall not appear or act on the trial in behalf of either party."

§ 843. (§ 539.) When a guardian is necessary, he must be appointed by the justice, as follows:

1. If the infant is plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he is of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed *to act as such*, and to be responsible for costs if he fail in the action, must be first filed with the justice.

2. If the infant is defendant, the guardian must be appointed at the time the summons is returned, or before the pleadings. It is the right of the infant to nominate his own guardian, if the infant is over fourteen years of age, and the proposed guardian is present and consent in writing to be appointed. Otherwise, the justice may appoint any suitable person who gives such consent.

§ 844. (§ 540.) The summons must be directed to the defendant and signed by the justice, and must contain:

1. The title of the court, name of the county and city, or township, in which the action is commenced, and the names of the parties thereto.

2. A sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him.

3. A direction that the defendant appear and answer before the justice, at his office, at a time specified in the summons.

4. In an action arising on a contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers, the plaintiff will take judgment for the sum claimed by him (stating it).

5. In other actions, a notice that unless defendant so appears and answers, the plaintiff will apply to the court for the relief demanded.

If the plaintiff has appeared by attorney, the name of the attorney must be indorsed on the summons.

Stat. 1851, 136, read: "The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious name; and shall summon him to appear before the justice at his office, naming its township or city, and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described, in general terms, sufficient to apprise the defendant of the nature of the claim against him; and in action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the justice before whom it is returnable."

§ 843. The time specified in the summons for the appearance of the defendant must be as follows:

First—If an order of arrest is indorsed upon the summons, forthwith;

Second—*If the defendant is not a resident of the county in which the action is brought, not less than twenty nor more than thirty days from its date;*

Third—In all other cases, not less than three nor more than twelve days from its date. (In effect May 27, 1874.)

but within the county where the action is brought, within five days after the service thereof.

"Third. If the plaintiff reside out of the township where the action is brought and the defendant resides in said township, within three days after the service thereof.

"Fourth. If the defendant reside out of the county or township in which the action is brought and the plaintiff resides in said township, within fifteen days after the service thereof.

"The defendant may appear in the action by demurrer or answer at any time after service of summons upon him, and shall notify the plaintiff, by written notice, of such appearance. If any of the defendants shall fail to answer or appear in the action within the time prescribed in the summons, such default shall be entered by the justice in his docket. If all of the defendants shall fail to appear or answer within the time prescribed in the summons, the justice shall thereupon enter judgment against them for the amount demanded in the summons, where the action is brought upon a contract for the direct payment of money; and in all other cases shall hear the proofs, and give judgment in accordance

with the pleadings and proofs. Where all the defendants served with process shall have appeared, or some of them have appeared and the remaining defendants have made default, the justice may proceed to try the cause, or, upon good cause shown by either party may fix the day for trial on any subsequent day not more than ten days thereafter."

Stat. 1851, 136, read: "The time mentioned in the summons for the appearance of the defendant, and the time of service, shall be as follows:

"1st. Where the summons is accompanied by an order to arrest the defendant, it shall be returnable immediately:

"2d. When the defendant is not a resident of the township or city, or where the plaintiff is not a resident, and gives the security required by this act, it shall be returnable not more than two days from its date, and shall be served at least one day before the time for appearance:

"3d. In all other cases it shall be returnable in not less than two nor more than ten days from its date, and shall be served at least two days before the time for appearance."

Stat. 1854, 67, same at stat. 1851, omitting in subdivision 2 thereof, the words 'and gives the security required by this act."

23 Cal. 85, Hisler v. Carr.

§ 846. (N. S.) If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not to exceed ninety days from its date.

§ 847. (N. S.) The justice may, within a year from the date of the filing of the complaint, issue as many alias summons as may be demanded by the plaintiff.

§ 848. The summons cannot be served within two days of the time fixed therein for the appearance of the defendant.

Vide § 815 and notes.

§ 849. (§ 542.) The summons may be served by a sheriff or constable of the county, or by any male resident of the county, over twenty-one years of age, not a party to the suit, and must be served and returned as prescribed in title five, part two, of this code; or it may be served by publication; and sections four hundred and thirteen and four hundred and twelve, so far as they relate to the publication of summons, are made applicable to justices' courts, the word "justice" being substituted for the word "judge," whenever the latter word occurs.

Stat. 1851, 136, § 542, read: "The summons shall be served by the sheriff or a constable of the county, as follows:

"1st. If the action be against a corporation, by a delivery of a copy to the president or other head of the corporation, or to the secretary, cashier, or managing agent thereof; or when no such officer resides in the county, to a director resident therein:

"2d. If against a minor under the age of fourteen years, by delivery of a copy to such minor, and also to his father, mother, or guardian; or if there be none within the county, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is:

"3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, by delivery of a copy to such guardian:

"4th. In all other cases, by delivery of the copy to the defendant personally."

Stat. 1854, 67, repealing stat. 1851, 137, § 54, read: "When the person upon whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the justice, and it shall, in like manner, appear that a cause of action exists against the defendant in respect to whom the service is to be made, the justice shall grant an order that service be made by the publication of the summons. The order shall direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least one week: provided, that publication against a defendant residing out of the state, or absent therefrom, shall not be less than three months. The service of summons shall be deemed complete at the expiration of the time prescribed by the order of publication; the justice shall also direct a copy of the summons to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence."

§ 850. (N. S.) The parties are entitled to one hour in which to appear after the time fixed in the summons, but are not bound to remain longer than that time, unless both parties have appeared, and the justice being present is engaged in the trial of another cause.

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§ 849. The summons may be served by a sheriff or constable *of any of the counties of this state; provided, that when a summons, issued by a justice of the peace, is to be served out of the county in which it was issued, the summons shall have attached to it a certificate under seal by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons,* or the summons may be served by any male resident, over the age of twenty-one years, not a party to the suit, *within the county where the action is brought,* and must be served and returned, as provided in Title V, Part II, of this Code, or it may be served by publication; and §§ 413 and 412, so far as they relate to the publication of summons, are made applicable to justices' courts; the word "justice" being substituted for the word "judge," whenever the latter word occurs. (In effect May 27, 1874.)

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

SECTION 851. Form of pleadings.
852. Pleadings in justices' courts.
853. Complaint defined.
854. When demurrer to complaint may be put in.
855. Answer.
856. If the defendant omits to set up counter claim.
857. When plaintiff may demur to answer.
858. Proceedings on demurrer.
859. Amendment of pleadings.
860. Answer or demurrer to amended pleadings.

§ 851. Pleadings in justices' courts—

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

2. May, *except the complaint*, be oral or in writing.

3. Must not be verified, unless otherwise provided in this title.

4. If in writing, must be filed with the justice.

5. If oral, an entry of their substance must be made in the docket.

Stat. 1851, 142, § 572, contained the substance of subdivisions 1, 5, and 4.

Stat. 1851, 141, § 571, read: "The pleading shall be in writing, and verified by the oath of the party, his agent or attorney, when the action is:

"1st. For the foreclosure of any mortgage or the enforcement of any lien on personal property;

"2d. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements, or other possessions;

"3d. To recover possession of a "mining claim." In other cases the pleading may be oral or in writing."

4 Cal. 120; 6 Cal. 63; 13 Cal. 598; 16 Cal. 372; 20 Cal. 282.

§ 852. (§ 570.) The pleadings are—

1. The complaint by the plaintiff.
2. The demurrer to the complaint.
3. The answer by the defendant.
4. The demurrer to the answer.

Stat. 1851, 141, read: "The pleadings in justices' courts shall be—
"1st. The complaint by the plaintiff stating the cause of action:
"2d. The answer by the defendant, stating the ground of the defence."

Idem 142, § 578, read: "Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defence, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded."

§ 853. (§ 573.) The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; *or a copy of the account, note, bill, bond or instrument upon which the action is based.*

Vide note to § 839 *supra*.

§ 854. The defendant may, at any time before answering, demur to the complaint.

Vide § 852 and note.

§ 855. (§ 574.) The answer may contain a denial of any *or all* of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defence or counter claim, upon which an action might be brought by the defendant against the plaintiff in a justices' court.

6 Cal. 447; 8 Cal. 339; 17 Cal. 80; 2 Cal. 48; 23 Cal. 61; 30 Cal. 545

§ 856. If the defendant omit to set up a counter claim in the cases mentioned in the last section neither he nor his assigns can afterwards maintain an action against the plaintiff therefor.

§ 857. When the answer contains new matter in avoidance, or constituting a defence or a counter claim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer.

§ 858. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint.

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith.

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow.

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

§ 859. Either party may, at any time before the conclusion of the trial, amend any pleading, but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered necessary, require, as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also on such terms as may be just and on payment of costs relieve a party from a judgment by default taken against him by his mistake, inadvertance, surprise, or excusable neglect, but the application for such relief must be made within ten days after the entry of the judgment and upon an affidavit showing good cause therefor.

Vide stat. 1851, 143, for substance of this section; which also provides that an amendment shall not be allowed after a witness is sworn on the trial, when it will necessitate an adjournment.

10 Cal. 342; 11 Cal. 280.

§ 860. When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow.

CHAPTER IV.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

ARTICLE I. ARREST AND BAIL.
II. ATTACHMENT.
III. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

ARTICLE I.

ARREST AND BAIL.

SECTION 861. Order of arrest and arrest of defendant.
862. Affidavit and undertaking for order of arrest.
863. A defendant arrested must be taken before the justice immediately.
864. The officer must give notice to the plaintiff of arrest.
865. The officer must detain the defendant.

§ 861. (§ 544.) An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors.

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity.

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought.

4. When the defendant has removed, concealed or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female can be arrested in any action.

Stat. 1851, 137, same as above § 861; adding to subdivision 1, the words "or where the action is for a wilful injury to the person, or for taking detaining, or injuring personal property;" also substituting in subdivision 2, the words "an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity," for the words "one who received it in a fiduciary capacity." It also added "arising after the passage of this act," after "cases."

§ 862. (§ 545.) Before an order for an arrest can be made the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking, in the sum of three hundred dollars, with two or more sureties, to the effect that if the defendant recover judgment the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking.

Stat. 1851, 137, fixed the undertaking at, "at least two hundred dollars."

§ 863. (§ 546.) The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of defendant, that he is a material witness in the action, the officer must immediately take the defendant before another justice of the township or city, if there is another, and if not, then before the justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

Stat. 1851, 137, inserted "next justice of the city or township," instead of "another justice of the township or city, if there is another, and if not, then before the justice of an adjoining township."

§ 864. (§ 547.) The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

§ 865. (§ 548.) The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice.

ARTICLE II.

ATTACHMENT.

SECTION 866. Writ of attachment shall issue upon affidavit.
867. Undertaking on attachment must be required.
868. Writ of attachment, substance of. Officer may take an undertaking instead of levying.
869. Certain provisions apply to all attachments in justices' courts.

§ 866. (§ 552.) A writ to attach the property of the defendant must be issued by the justice at the time of, or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section five hundred and thirty-eight of this code.

Stat. 1851, 138, read: "A writ to attach the property of the defendant shall be issued by the justice, on receiving an affidavit by or on behalf of the plaintiff, showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs, or counter claims) upon a contract express or implied, for the direct payment of money, that such contract was made after the passage of this act, and was made or is payable in this state, and that the payment of the same has not been secured by any mortgage on real or personal property."

Stat. 1858, 154, read: "A writ to attach the property of the defendant shall be issued by the justice, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section one hundred and twenty-one of this act."

§ 867. (§ 553.) Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, *in a sum not less than fifty, nor more than three hundred dollars*, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, *not exceeding the sum specified in the undertaking*.

[Amendment of February 15, 1872, was identical with § 867.]

Stat. 1860, 298, omitted words in *italics*.

Stat. 1858, 154, inserted in stat. 1860, the words "or if the attachment be dismissed," between "judgment" and "the plaintiff." Act of 1858 did not apply to contracts entered into prior to July 1, 1858.

Stat. 1851, 138, same as stat. 1860.

Stat. 1863-64, 423, read: "In all civil cases arising in justices' courts, wherein an undertaking is required as prescribed in section twenty-eight of an act entitled 'an act to regulate proceedings in civil cases in courts of justice in this state,' passed April twenty-eighth, eighteen hundred and sixty, and sections five hundred and forty-five (545) and five hundred and fifty (550) of an act entitled 'an act to regulate proceedings in civil cases in courts of justice in this state,' passed May fifteenth, eighteen hundred and fifty-four, the plaintiff or defendant may deposit with said justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking."

§ 868. (§ 554.) The writ may be directed to the sheriff or any constable of the county, *or the sheriff of any other county*, and must require him to attach and safely keep all the property *of the defendant* within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking.

§ 869. (§ 555.) The sections of this code, from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION 870. How claim and delivery enforced.

§ 870. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this code, from section five hundred and ten to section five hundred and twenty-one,

both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge."

Vide stat. 1851, 139–41; §§ 556 to 569, inclusive; also §§ 494, 516, 1057.

[*Amendment of March* 2, 1872. § 567. The qualification of sureties in the several undertakings required by this chapter shall be as follows: First—Each of them shall be a resident and householder or freeholder within the county. Second—Each shall be worth *the amount* stated in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.]

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

SECTION 871. Judgment when defendant fails to appear.
872. Judgment against defendant on demurrer.

§ 871. When the defendant fails to appear and answer or demur, at the time specified in the summons, or within one hour thereafter, then, upon proof of service of the summons, the following proceedings must be had:

1. If the action is based upon a contract, and is for the recovery of money or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons.

2. In all other actions the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such a sum (not exceeding the amount stated in the summons) as appears by such evidence to be just.

Stat. 1851, 145, § 592, read: "When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows:

"First. When a copy of the account, note, bill, or other obligation upon which the action is brought, was filed with the justice at the time the summons was issued, judgment shall be given without further evidence, for the sum specified in the summons.

"Second. In other cases the justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just; but in no case exceeding the amount specified in the summons."

Idem § 586, read: "If the plaintiff fail to appear at the return day of the summons, the action shall be dismissed. If the defendant fail to appear at the return day of the summons, or if either party fail to attend at a day to which the trial has been adjourned, or fail to make the necessary pleading or proof on his part, the case may, nevertheless, proceed,

at the request of the adverse party, and judgment shall be given in conformity with the pleadings and proofs."

Stat. 1867–68, 550, read: "If either party shall fail to appear at the time fixed for trial, or at the time to which the trial has been adjourned, the trial may proceed at the request of the adverse party, and judgment shall be rendered in conformity with the pleadings and proofs."

§ 872. In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

1. If the complaint has been amended, and the defendant fails to answer it as amended, within the time allowed by the court.

2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once.

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court.

Vide notes to sections 852–9, *supra*.

CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

SECTION 873. Time when trial must be commenced.
874. When court may, of its own motion, postpone trial.
875. Postponement by consent.
876. Postponement upon application of a party.
877. No continuance for more than ten days to be granted, unless upon filing of undertaking.

§ 873. Unless postponed as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the summons for the appearance of defendant, and the trial must be continued, without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of.

Vide supra §§ 833, 876, 859 and notes.

§ 874. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action.

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary.

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded.

Vide §§ 833, 876, 859 and notes.

§ 875. The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

Vide §§ 833, 876, 859 and notes.

§ 876. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody, but the action may proceed notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged.

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by, the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in

the undertaking. On filing the undertaking specified in this subdivision, the justice must order the defendant to be discharged from custody.

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness was produced.

But the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

Vide sections *supra* 859, 833 and notes.

Stat. 1851, 113, § 583, read: "The trial may be adjourned by consent, or upon application of either party, without the consent of the other, for a period not exceeding ten days (except as provided in the next section), as follows:

"1st—The party asking the adjournment shall, if required by his adversary, prove by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial.

"2d—The party asking the adjournment shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before the justice, which shall accordingly be done; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if the witness were produced."

Stat. 1851, 63, added to stat. 1851, subdivision 1, the words "and shall show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;" also to subdivision 2, the words "but such objections shall be made at the time of taking the deposition;" also added a subdivision numbered as 3, as follows:

"3d. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed."

Stat. 1851, 63, § 43, amending § 584, of stat. 1851, read: "An adjournment may be had, either at the time of joining issue, or at any subsequent time, to which the case may stand adjourned, on application of either party, for a period longer than ten days, but not to exceed four months, from the time of the return of summons, upon proof by the oath of the party, or otherwise, to the satisfaction of the justice, that such party cannot be ready for trial before the time to which he desires an adjournment, for want of material evidence, particularly describing it, and that the delay has not been made necessary by any act of negligence on his part since the action was commenced; that he has used due diligence to procure the evidence, and has been unable to do so, and that he expects to procure the evidence at the time stated by him; provided, that if the adverse party admit that such evidence would be given, and consent that it may be considered as given on the trial, or offered and overruled as improper, the adjournment shall not be had."

Stat. 1851, § 584, was same, omitting the proviso; and inserting "ninety days" for "four months;" also omitting the words "that he has used due diligence to procure the evidence, and has been unable to do so."

§ 877. (§ 585.) No adjournment must, *unless by consent*, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, *in an amount fixed by the justice*, with *two* sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, *not exceeding the sum specified in the undertaking*.

CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

SECTION 878. Issue defined, and the different kinds.
879. Issue of law, how raised.
880. Issue of fact, how raised.
881. Issue of law, how tried.
882. Issue of fact, how tried.
883. Jury, how waived.
884. Either party failing to appear, trial may proceed at request of other party.
885. Challenges to jurors.
886. Manner of pleading a written instrument.
887. If a copy of an instrument be filed, the signatures will be deemed admitted, unless denied under oath.

§ 878. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

§ 879. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

§ 880. An issue of fact arises:—

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matter in the answer, except an issue of law is joined thereon.

§ 881. An issue of law must be tried by the court.

§ 882. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

§ 883. A jury may be waived—

1. By consent of parties, entered in the docket.

2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact.

3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

Stat. 1851, 144, read: "§ 587. A trial by jury shall be demanded at the time of joining issue, and shall be deemed waived if neither party then demand it. When demanded, the trial of the case shall be adjourned until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the justice, and shall be on the same day, or within the next two days. The jury shall be summoned upon an order of the justice, from the citizens of the city or township, and not from the bystanders."

§ 884. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

Vide note to § 871 *supra*.

§ 885. (§ 590.) The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth in section six hundred and two. Challenges for cause must be tried by the justice.

Stat. 1851, 144, was same, inserting at the beginning: "Either party may challenge the jurors," and at the end "in a summary manner who may examine the juror challenged, and witnesses."

§ 886. (§ 576.) When the cause of action or counter claim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument cannot be given in evidence.

Stat. 1851, 142, read: "When the cause of action or counter claim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set-off. The court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence."

§ 887. (§ 577.) If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the defendant is deemed to admit the genuineness of the signatures of the makers, indorsers or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

Stat. 1851, 142, read "When the defendant answers the complaint every material allegation therein, not denied by the answer, shall, on the trial, be taken to be true."

Stat. 1854, 84, same as § 887, omitting "the original or."

CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.

SECTION 889. Judgment by confession.
890. Judgment of dismissal entered in certain cases without prejudice.
891. Judgment upon verdict.
892. Judgment after trial by the court.
893. Judgment when the defendant is subject to arrest.
894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.
895. Offer to compromise before trial.
896. Costs must be included in the judgment.
897. Abstract of judgment.
898. Abstract may be filed and docketed in county clerk's office.
899. Effect of docketing.
900. Judgment not a lien unless abstract is recorded in the recorder's office.

§ 889 (§ 536.) Judgments upon confession may be entered up in any justices' court specified in the confession.

Stat. 1851, 135, inserted "in the state" between "court" and "specified."

8 Cal. 76.

§ 890. (§ 591.) Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted.

2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter.

3. *When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court.*

4. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but if the objection is taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

Stat. 1851, 145, added "and shall not be cause for reversal;" to last subdivision.

18 Cal. 128; 29 Cal. 312.

§ 891. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict.

Vide § 892 and note.

§ 892. When the trial is by the court, judgment must be entered at the close of the trial.

Stat. 1863, 690-91, read: "§ 594. Upon a verdict, the justice shall immediately render judgment accordingly. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within four days after the close of the trial. If the action be on a contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment shall be entered up only against those who were served or have voluntarily appeared, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the individual property of the defendants served, or who have voluntarily appeared in the action. In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein."

Stat. 1854, 68, same as stat. 1863, omitting the last sentence; also the words "or have voluntarily appeared;" and also, "or who have voluntarily appeared in the action."

Stat. 1851, 145, same as stat. 1863, omitting all after the words "close of the trial."

§ 893. (§ 597.) When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact *that the defendant is so subject*, must be so stated in the judgment.

Stat. 1851, 146, added "and entered in the docket."

§ 894. (§ 595.) When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

§ 895. (§ 596.) If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs, but costs must be adjudged against him, and if he recover, be deducted from his recovery. The offer and failure to accept it cannot be given in evidence, nor affect the recovery otherwise than as to costs.

§ 896. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

§ 897. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in the following form (filling blanks according to the facts):

STATE OF CALIFORNIA, ——— county. ———, plaintiff, vs. ———, defendant. In justices' court, before ———, justice of the peace, ——— township (or city), ———, 187—. Judgment entered for plaintiff (or defendant) for $———, on the ——— day of ———. I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, or (as the case may be) in the court of ———, justice of the peace, as appears by his docket now in my possession, as his successor in office.

——— ———, justice of the peace.

Vide § 900 and note.

§ 898. The abstract may be filed and docketed in the office of the county clerk of the county in which the judgment was rendered, and must be docketed in the judgment docket of the county court. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

Vide § 900 and note.

§ 899. From the time of docketing in the county clerk's office, execution may be issued thereon by the county clerk to the sheriff of any county in the state, other than the county in

which the judgment was rendered, in the same manner and with like effect as if issued on judgments of the county courts.

Vide § 900 and note.

§ 900. A judgment rendered in a justice court creates no lien upon any lands of the defendant, unless such an abstract is filed and recorded in the office of the recorder of the county in which the lands are situated. When so filed and recorded, such judgment is a lien upon the lands of the judgment debtor situated in that county.

Instead of last three sections, stat. 1854, 69, read: "§ 599. The justice, on demand of the party in whose favor judgment is rendered, shall give him a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the county clerk, shall be noted by him thereon and entered in the docket; and from that time executions may be issued by the county clerk on such judgments to the sheriff of any other county of the state, in the same manner as upon judgments recovered in the higher courts. All process upon judgments recovered in justice's courts, to be executed within the same county, shall be issued by the justice or his successors in office. *No judgment rendered by a justice of the peace shall create any lien upon any lands of the defendant, unless a transcript of such judgment, certified by the justice, be filed and recorded in the office of the recorder. When such transcript is to be filed in any other county than that in which the justice resides, such transcript shall be accompanied with the certificate of the county clerk as to the official character of the justice. When so filed and recorded in the office of the recorder for any county, such judgment shall constitute a lien upon, and bind the lands and tenements of the judgment debtor, situated in the county where such transcript may be filed and recorded in favor of such judgment creditor as if such judgment had been rendered in the district court of such county.*"

Stat. 1851, 146, § 599, omitted from stat. 1854, the *italicised* words.

27 Cal. 370.

CHAPTER IX.

EXECUTIONS FROM JUSTICES' COURTS.

SECTION 901. Execution may issue at any time within five years.
902. Execution, contents of.
903. Renewal of execution.
904. Duty of officer receiving execution.
905. Proceedings supplementary to execution.

§ 901. (§ 600.) Execution for the enforcement of a judgment of a justice's court may be issued *by the justice who entered the judgment, or his successor in office*, on the application

of the party entitled thereto, at any time within five years from the entry of judgment.

8 Cal. 512; 16 Cal. 372; 26 Cal. 156.

§ 902. (§ 601.) The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township or city where, and the time when, it was rendered; the amount of judgment, if it be for money; and, if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as are required by the provisions of title nine, part two, of this code, in an execution to the sheriff.

Stat. 1851, 146, inserted "when issued by a justice," between "execution" and "must;" also, "by whom the judgment was rendered, or his successor in office," between "subscribed by" and "and bear;" also, "to be executed," after "officer," and before "it."

17 Cal. 294.

§ 903. (N. S.) An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterwards issued.

§ 904. (§ 602.) The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of title nine, part two, of this code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

Stat. 1851, 146.

Stat. 1851, 69, added the words "and after issuing an execution, and either before or after its return (if the same be returned unsatisfied either in whole or in part), the judgment creditor shall be entitled to an order from the justice, requiring the judgment debtor to attend at a time to be designated in the order, and answer concerning his property before such justice, and the attendance of such debtor may be enforced

by the justice. On his attendance, such debtor may be examined under oath concerning his property; and any person alleged to have in his hands property, moneys, effects or credits of the judgment debtor, may also be required to attend and be examined, and the justice may order any property in the hands of the judgment debtor, or any other person, not exempt from execution, belonging to such debtor, to be applied towards the satisfaction of the judgment, and the justice may enforce such order by imprisonment until complied with; but no judgment debtor or other person shall be required to attend before the justice out of the county in which he resides."

§ 905. The sections of this code, from seven hundred and fourteen to seven hundred and twenty-one, both inclusive, are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff," and the word "justice" for the word "judge."

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

SECTION 906. Contempts a justice may punish for.
907. Proceedings for contempt.
908. Same.
909. Punishments for contempts.
910. The conviction must be entered in the docket.

§ 906. (§ 616.) A justice may punish as for contempt, persons guilty of the following acts, and no other:

1. Disorderly, contemptuous or insolent behavior towards the justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding.

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him.

4. Disobedience to a subpœna duly served, or refusing to be sworn or to answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him.

§ 907. (§ 617.) When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made reciting the facts, as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

§ 908. (§ 617.) When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defence, or excuse must be given. The justice may, thereupon, discharge him, or may convict him of the offence.

§ 909. (§ 617.) A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

§ 910. (§ 618.) The conviction, specifying particularly the offence and the judgment thereon, must be entered by the justice in his docket.

CHAPTER XI.

DOCKETS OF JUSTICES.

SECTION 911. Docket, what to contain.
912. Entries therein primary evidence of the facts
913. An index to the docket must be kept.
914. Dockets must be delivered by justice to his successor or to county clerk.
915. Proceedings when office becomes vacant and before a successor is appointed.

SECTION 916. A justice may issue execution or other process upon the docket of his predecessor.
917. Successor of a justice, who shall be deemed.
918. If two justices might be deemed successors, the county judge shall designate one.

§ 911. (§ 604.) Every justice must keep a book, denominated a "docket," in which he must enter:

1. The title of every action or proceeding.

2. The object of the action or proceeding; and if a sum of money is claimed, the amount thereof.

3. The date of the summons, and the time of its return; and if an order to arrest the defendant is made, or a writ of attachment is issued, a statement of the fact.

4. The time when the parties, or either of them, appear, or their non-appearance, if default is made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings, and of all motions made during the trial by either party, and his decisions thereon.

5. Every adjournment, stating on whose application, whether on oath, evidence or consent, and to what time.

6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.

7. The names of the jurors who appear and are sworn, and the names of all witnesses sworn, and at whose request.

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.

9. The judgment of the court, specifying the costs included and the time when rendered.

10. *The motion for a new trial, when made and how disposed of.*

11. The issuing of the execution, when issued and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the justice, when and by whom.

12. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

Stat. 1855, 197.

Stat. 1851, 146, omitted in subdivision 4, the words "and motions;" also, "and of all motions made during the trial by either party, and his decisions thereon;" also, in subdivision 12, the words "and of the appeal bond, if any be filed;" also subdivision 10.

10 Cal. 93; 15 Cal. 296; 34 Cal. 321.

§ 912. (§ 605.) The several particulars of the last section specified must be entered under the title of the action to which they relate, and (*unless otherwise in this title provided*) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice or his successor in office, are primary evidence of the facts so stated.

32 Cal. 49; 34 Cal. 321.

§ 913. (§ 606.) A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name.

§ 914. (§ 607.) Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody to be kept as public records.

Vide § 915 and note.

§ 915. (§ 607.) If the office of a justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice.

Stat. 1851, 147, read: "It shall be the duty of every justice, upon the expiration of his term of office, to deposit with his successor his official dockets, as well his own, as those of his predecessors, which may be in his custody, to be kept as public records. If the office of a justice become vacant by his death, or removal from the township or city, or otherwise, before his successor is elected and qualified, the dockets in

possession of such justice shall be deposited with the county clerk of the county, to be by him delivered to the successor in office of the justice."

Stat. 1863, 232, read: "It shall be the duty of every justice of the peace, upon the expiration of his term of office, to deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody, to be kept as public records. If the office of a justice become vacant by his death, or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice shall be deposited in the office of some other justice in the township, to be by him delivered to the successor of said justice; and while in his possession, he may issue execution on a judgment there entered and unsatisfied, in the same manner and with the same effect as the justice by whom the judgment was entered might have done. If there be no other justice in the township, then the dockets and papers of such justice shall be deposited in the office of the *county clerk of the* county, to be by him delivered to the successor in office of the justice."

Stat. 1869–70, inserted in 1863, the words "may make all orders in proceedings supplemental to execution, and may file notices and undertakings on appeal, and may take the justification of the sureties, and on the filing of the undertaking on appeal, order stay of execution," between the words "unsatisfied" and "in the same manner."

Stat. 1867–68, 276, provided for the presiding justice of the peace taking possession of the dockets of former justices of the peace.

§ 916. (§ 608.) Any justice with whom the docket of his predecessor or of another justice is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this section, considered the successor of such former justice.

Stat. 1851, 147, read: "Any justice with whom the docket of his predecessor is deposited, may issue execution on a judgment there entered and unsatisfied, in the same manner, and with the same effect as the justice by whom the judgment was entered might have done."

Stat. 1855, 304, same as stat. 1851, inserting "or other process," between "execution" and "on;" also adding, thereto, the last sentence of § 916.

Stat. 1863, 232, same as above section 916, substituting for the first sentence thereof, the following: "Any justice with whom the docket of his predecessor is deposited shall have and exercise over all actions and proceedings entered in the docket of his predecessor, the same jurisdiction as if originally commenced before him."

§ 917. (§ 609.) The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time is the successor.

§ 918. (§ 610.) When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, the county judge must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of a justice going out of office, or whose office has become vacant.

CHAPTER XII

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

SECTION 919. Justices may issue subpœnas and final process to any part of the county.
920. Blanks must be filled in all papers issued by a justice, except subpœnas.
921. Justices to receive all moneys collected and pay same to parties.
922. In case of disability of justice, another justice may attend on his behalf.
923. Justices may require security for costs.
924. Who entitled to costs.
925. What provisions of code applicable to justices' courts.

§ 919. (§ 619.) Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

Stat. 1851, 149.

Stat. 1863, 496, added the words: "A justice of the peace may issue summons to any person, a resident of the proper township, to appear before him, at his office, to act as interpreter in any action or proceeding in the courts held by him. Such summons shall be served and returned in like manner as a subpœna issued by a justice. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt, and may be punished accordingly."

§ 920. (§ 611.) The summons, execution and every other paper made or issued by a justice, except a subpœna, must be issued without a blank left to be filled by another, otherwise it is void.

§ 921. (§ 633.) Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and all moneys paid to them in their official capacity, and must pay the same over to the parties entitled or authorized to receive them, without delay.

Stat. 1851, 151, added the words: "For a violation of this section they may be removed from their office, and shall be deemed guilty of a misdemeanor."

§ 922. (§ 612.) In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

§ 923. (§ 634.) Justices may, in all cases, require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

§ 924. (§ 631.) The prevailing party in justices' courts is entitled to costs.

Stat. 1855, 251.

Stat. 1854, 71, read: "§ 631. Costs shall be allowed to the prevailing party in a justices' court as follows:

"1st. To the plaintiff, ten per cent. on the amount of the money, or the value of the property recovered, if the action be litigated; five per cent., if the action be not litigated.

"2d. To the defendant, ten per cent. on the amount of the value of the property claimed by the plaintiff in his complaint; *Provided*, that such per cent. shall not be allowed in actions for forcible entry and unlawful detainer, or in actions to recover, or to determine the rights of a mining claim, or upon a non-suit."

Stat. 1851, 151, omitted from 1854, the proviso.

§ 925. (N. S.) Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein.

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

SECTION 929. How commenced.
930. Summons must issue on filing complaint.
931. Defendant may plead orally or in writing.
932. Trial by jury, when defendant is entitled to.
933. Proceedings to be conducted as in justices' courts.

§ 929. (§ 636.) Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint must be verified by the oath of the party complaining, or of his attorney or agent.

Stat. 1851, 151, read "recorders and mayors" instead of "police."

§ 930. (§ 637.) Immediately after filing the complaint a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing.

§ 931. (§ 638.) On the return of the summons the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless, for good cause shown, an adjournment is granted.

Stat. 1851, 151, read "may plead to the complaint, or he may answer or deny the same;" also, "such plea, answer, or denial," instead of "may answer the complaint;" and "the answer."

§ 932. (§ 639.) In all actions for violation of an ordinance, where the fine, forfeiture or penalty imposed by the ordinance is less than fifty dollars, the trial must be by the court. In actions where the fine, forfeiture or penalty imposed by the ordinance is over fifty dollars, the defendant is entitled to a trial by jury.

Stat. 1851, 151, read "if demanded by him, to a jury of six persons" instead of "to a trial by jury."

§ 933. (§ 641.) All proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts.

Stat. 1851, 152, read "recorders and mayors" instead of "police."

TITLE XIII.

OF APPEALS IN CIVIL ACTIONS.

CHAPTER I. APPEALS IN GENERAL.
II. APPEALS FROM DISTRICT COURTS.
III. APPEALS FROM COUNTY COURTS.
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CHAPTER I.

APPEALS IN GENERAL.

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SECTION 952. What papers to be used on an appeal from an order granting or refusing a new trial.
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§ 936. (§ 333.) A judgment or order in a civil action, except when expressly made final by this *code*, may be reviewed as prescribed in this title, and not otherwise.

Stat. 1854, 64.

Stat. 1851, 104, omitted the words, "except when expressly made final by the code (act)."

8 Cal. 297; 24 Cal. 334.

§ 937. (§ 334.) An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

12 Cal. 440.

§ 938. (§ 335.) Any party aggrieved may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent.

2 Cal. 57; 6 Cal. 666; 17 Cal. 250; 22 Cal. 456; 23 Cal. 636; 38 Cal. 637, 679.

§ 939. (§ 336.) An appeal may be taken:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the *entry* of judgment. *But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment.*

2. From a judgment rendered on an appeal from an inferior court, within ninety days after the *entry* of such judgment.

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; *from an order granting or refusing to grant a change of the place of trial;* from any special order made after final judgment, and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court *or filed with the clerk.*

Stat. 1865-66, 706-7, read "rendition," instead of "entry," in subdivisions 1 and 2; also omitted the other *italicised* words.

Stat. 1863, 755, read "rendition" instead of "entry," in subdivisions 1 and 2; also omitted the other *italicised* words; also in subdivision 3, the words "from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial—and from an interlocutory judgment in actions for partition or real property—or interlocutory judgment."

Stat. 1859, 140, read "rendition" instead of "entry," in subdivisions 1 and 2; also omitted the *italicised* words in subdivision 1; also inserted instead of subdivision 3, the following: "3d. From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding, after a motion is made therefor, in the cases provided by law, or on the ground that the judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction, *and from an order refusing to grant or dissolve an injunction*, and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes of the court."

Stat. 1854, 64, read "rendition" instead of "entry," in subdivisions 1 and 2; also omitted the *italicised* words in subdivision 1; subdivision 3 read same as subdivision 3 of stat. 1859, omitting the words "and from an order refusing to grant or dissolve an injunction;" and adding the words "this section shall not extend to appeals to the district court from orders or judgments of the probate courts, but shall extend to judgments rendered in the district courts upon such appeals."

Stat. 1851, 104-5, read "rendition" instead of "entry," in subdivisions 1 and 2; also omitted *italicised* words in subdivision 1; also substituted instead of subdivision 3, the following: "3d. From an order made at a special term within sixty days after the order is made, and entered in the minutes of the clerk. This section shall not extend to appeals to the district courts from orders or judgments of the probate courts, but shall extend to judgments rendered in the district courts upon such appeals."

Stat. 1863-64, 223, read as follows: "In addition to appeal provided for by section three hundred and thirty-six of an act to regulate proceedings in civil cases in the courts of justice of this state, passed April twenty-ninth, A.D. eighteen hundred and fifty-one, an appeal may be taken from the judgment or decree of the court in cases of partition, which determines the right of the several parties and directs partition to be made; *provided*, that upon the filing the bond mentioned in section three hundred and forty-eight of an act entitled an act to regulate proceedings in civil cases, passed April twenty-ninth, eighteen hundred and fifty-one, all proceedings in the case pending the appeal shall be stayed."

SUB-DIVISION 1: 28 Cal. 416; 31 Cal. 207; 32 Cal. 159; 36 Cal. 249; 38 Cal. 423, 671.

SUB-DIVISION 2; 20 Cal. 141.

SUB-DIVISION 3: 7 Cal. 398; 8 Cal. 522; 10 Cal. 480; 22 Cal. 650; 28 Cal. 416; 30 Cal. 11, 280; 31 Cal. 207; 38 Cal. 286.

§ 940. (§ 337.) An appeal is taken by–

1. Filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, or some specific part thereof.

2. Filing at the same time an undertaking on appeal; and,

3. Serving a copy of the notice of appeal upon the adverse party or his attorney.

Stat. 1851, 105, read: "The appeal shall be made by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney."

24 Cal. 364; 29 Cal. 224.

Filing and serving notice: 7 Cal. 244; 9 Cal. 641; 10 Cal. 31, 185, 490; 22 Cal. 650; 21 Cal. 94, 609; 26 Cal. 262; 29 Cal. 465; 30 Cal. 527; 31 Cal. 107; 32 Cal. 475; 35 Cal. 184; 38 Cal. 637.

§ 941. (§ 348.) The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal.

Vide § 947.

Stat. 1851, 106, read: "To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made with the clerk within five days after the notice of appeal is filed."

7 Cal. 244; 9 Cal. 33, 278; 10 Cal. 185; 13 Cal. 606; 21 Cal. 512; 23 Cal. 136, 328.

§ 942. (§ 349.) If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, *or the appeal be*

dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal. When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section must be drawn and made payable in the same kind of money or currency specified in such judgment.

Vide §§ 947, 948.

Stat. 1863, 630, inserted the words "stating their places of residence and occupation," between "sureties" and "to the effect;" but omitted the words in *italics*.

Stat. 1851, 106-7, omitted the last sentence; also the words in *italics*.

10 Cal. 335; 13 Cal. 502; 15 Cal. 327, 374; 25 Cal. 337; 29 Cal. 138; 40 Cal. 278.

§ 943. (§ 350.) If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint; or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or the judge thereof, or county judge, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Vide §§ 947, 948.

§ 944. (§ 351.) If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

§ 945. (§ 352.) If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer

to be committed, any waste thereon, and that if the judgment be affirmed *or the appeal be dismissed* he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

Vide §§ 947, 948.

21 Cal. 233; 25 Cal. 337; 29 Cal. 11.

§ 946. (§ 353.) Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee or other person acting in another's right. An appeal from an order dissolving an attachment does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after the entry of the order appealed from, and such appeal be perfected.

Stat. 1865-66, 707, inserted the words, "and on appeal, and filing an appeal bond on appeal from an order discharging an attachment, said attachment shall not be dissolved, but shall remain in full force until the cause be disposed of on appeal," between "embraced therein," and "but the court;" also the words, "also, notice of the appeal be given," between "and unless" and "within five days;" also the words "service of the notice of," between "five days after" and "the entry;" also added the words, "and the undertaking in this section mentioned be filed within five days thereafter."

Stat. 1851, 107, omitted all after the words, "another's rights;" also read, "matter included," instead of "embraced;" also inserted "judgment or," before "order appealed from,"

7 Cal. 132.

§ 947. (§ 354.) The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant.

§ 948. (§ 355.) The adverse party may except to the sufficiency of the sureties to the undertaking or undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three and nine hundred and forty-five, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, a county judge or county clerk, upon five days notice to the appellant, execution of the judgment or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, is equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

Stat. 1865-66, 708, prefixed the words, "an undertaking on appeal shall be of no effect unless it be accompanied by the affidavit of the sureties that they are each worth the amount specified therein over and above all their just debts and liabilities exclusive of property exempt from execution, except where the judgment exceeds three thousand dollars and the undertaking is executed by more than two sureties; they may state in their affidavit that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties."

Stat. 1851, 65, prefixed the same words as stat. 1865-66; also omitted the words, "to the undertaking or undertakings mentioned in sections 941, 942, 943 and 945 at any time;" also read "five days," instead of "thirty days;" also read "justify before a judge of the court below, or a county judge or the county clerk within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given," instead of "within twenty days after the appellant has been served with notice of such exception justify before a judge of the court below, a county judge or county clerk, upon five days notice to the appellant, the execution of the judgment or decree appealed from is no longer stayed."

Stat. 1851, 108, read: "An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein, over and above all their just debts and liabilities, exclusive of property exempt from execution. The adverse party may, however, except to the sufficiency of the sureties, within five days after the filing of the undertaking; and unless they or other sureties justify before a judge of the court below, or a county judge, or the county clerk, within five days thereafter (upon no-

§ 949. In cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section 941, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court. *And except also, where it adjudges the defendant guilty of usurping or intruding into, or unlawfully holding a public office, civil or military, within this state. And except also, where the order grants, or refuses to grant, a change of the place of trial of an action.* (In effect February 16, 1874.)

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appellant must furnish the court with a copy of the notice of appeal, the pleadings, or amended pleadings, which form the issues tried in the case, the judgment, *bills of exception* and such other parts of the judgment roll, and no more, as are necessary to present or explain the points relied on.

Stat. 1863-64, 247, read "a transcript" instead of "a copy;" also inserted "as the case may be" after "amended pleadings;" also added the words "and the statement, if there be one, certified by the attorneys of the parties to the appeal, or by the clerk, to be correct. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct. If any written opinion be placed on file in rendering the judgment or making the order in the court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed."

Stat. 1854, 64, read: "On appeal from a final judgment, the appellant shall furnish the court with a copy of the notice of appeal, the judgment roll and the statement annexed (if there be one), certified by the clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used in the hearing of the court below; such copies to be certified by the clerk to be correct. If any written opinion be placed on file on rendering the judgment or making the order in the court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed."

Stat. 1851, 103, substantially the same as stat. 1854, omitting the words "if there be one:" also inserting the words "at a special term" between "an order" and "the appellant shall;" also the words "be given" instead of "be placed on file."

25 Cal. 478; 34 Cal. 28.
Notice of appeal: 8 Cal. 340; 10 Cal. 490; 29 Cal. 460; 35 Cal. 289.
Transcript, generally: 21 Cal. 267; 26 Cal. 263; 28 Cal. 555; 29 Cal. 486; 31 Cal. 657; 34 Cal. 28, 506; 35 Cal. 184; 36 Cal. 129, 580.

§ 951. (§ 346.) On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, the judgment or order appealed from and of the bill of exceptions relating thereto.
Vide § 950, and note.
28 Cal. 649; 27 Cal. 686. See cases under § 950.

§ 952. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of motion for new trial and of appeal, and of the statement provided for in section six hundred and sixty-one, and of all the pleadings, papers, bills of exception and affidavits referred to and made part of such statement.
Vide § 950 and note.
23 Cal. 540; 25 Cal. 534; 28 Cal 58; 29 Cal. 612. See cases under § 950.

§ 953. (§ 346.) The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk that an undertaking on appeal, in due form, has been properly filed.
Vide § 950 and note.
Undertaking: 8 Cal. 340; 28 Cal. 58.

§ 954. (§ 346.) If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal.
Vide § 950 and note.
25 Cal. 584; 35 Cal. 184.

§ 955. (N. S.) The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.
40 Cal. 105, 278.

§ 956. (§ 345.) Upon an appeal from a judgment, the court may review the verdict or decision, if excepted to, or any intermediate order, if excepted to, which involves the merits or necessarily affects the judgment.

Vide § 957 and note.

24 Cal. 447; 27 Cal. 636; 28 Cal. 295; 30 Cal. 280.

§ 957. (§ 345.) When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

Stat. 1851, 105-6, read: "Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside or confirm, or modify any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, and when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just."

10 Cal. 335; 14 Cal. 667; 23 Cal. 649

§ 958. (§ 358.) When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed or modified by the supreme court on appeal.

3 Cal. 212; 22 Cal. 24.

§ 959. The provisions of this chapter do not apply to appeals to county courts.

CHAPTER II.

APPEALS FROM DISTRICT COURTS.

SECTION 963. When an appeal may be taken.

§ 963. (§ 347.) An appeal may be taken to the supreme court, from the district courts, in the following cases:

1. From a final judgment entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts.

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving, or refusing to dissolve, an attachment; *from an order changing, or refusing to change, the place of trial;* from any special order made after final judgment, and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made.

Vide § 939 and notes.

Stat. 1865–66, 707.

Stat. 1863, 756, omitted from subdivision 2 the words "from an order dissolving, or refusing to dissolve an attachment; from an order changing or refusing to change, the place of trial; and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made."

Stat. 1854, 61, inserted the words "and the superior court of the city of San Francisco" after "district courts;" also substituted for subdivision 2, the words: "From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding after a motion is made therefor, in the cases provided by law, or on the ground that a judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction; and from any special order made after final judgment."

Stat. 1851, 106, was same as stat. 1854, substituting for subdivision 2 thereof, the words: "From an order made at a special term granting or refusing a new trial, or which affects a substantial right in an action or special proceeding."

3 Cal. 50; 12 Cal. 99; 25 Cal. 154; 34 Cal. 167.

Appealable orders: 8 Cal. 52, 130; 13 Cal. 53, 295; 16 Cal. 145; 18 Cal. 30; 30 Cal. 530.

Condemnation of land: 24 Cal. 334; 29 Cal. 112.

Contempts: 7 Cal. 175; 9 Cal. 107; see 36 Cal. 542.

Partition: 30 Cal. 11; 31 Cal. 207.

Non-appealable orders: 2 Cal. 492; 4 Cal. 303, 375; 6 Cal. 83, 666; 7 Cal. 117; 9 Cal. 277; 10 Cal. 503, 527; 15 Cal. 42, 302; 18 Cal. 141; 19 Cal. 124; 21 Cal. 419; 23 Cal. 321, 637; 29 Cal. 192; 30 Cal. 527; 31 Cal. 207, 365; 32 Cal. 73, 159, 304, 488; 35 Cal. 289; 36 Cal. 112; 38 Cal. 567; 39 Cal. 145, 292.

CHAPTER III.

APPEALS FROM COUNTY COURTS.

SECTION 966. When may be taken.

§ 966. (§ 359.) An appeal may be taken to the supreme court, from the county courts, in the following cases:

1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency; and in any special proceeding.

2. From an order granting or refusing a new trial; from an order granting or dissolving, or an order refusing to grant or dissolve, an injunction; *from an order changing, or refusing to change, the place of trial;* and from any special order made after final judgment in the cases in this section before enumerated.

Stat. 1865-66, 846, inserted the words, "a final judgment of," between "from" and "the county courts," and omitted them in subdivision 1; also in subdivision 1, the words, "in an action wherein the legality of any tax, impost, assessment, toll, or municipal fine is in question;" also read "and in any special case within the appellate jurisdiction of the supreme court, over which the legislature may require said county court to exercise jurisdiction," instead of "and in any special proceeding."

Stat. 1854, 65, read, "an appeal may be taken to the supreme court from a judgment of the county court, in all cases where the amount in dispute exceeds two hundred dollars, or where the legality of any tax, toll or impost, or municipal fine, is in question."

Stat. 1853, 277, read, "An appeal may be taken to the district courts from the county courts of the county or counties comprising any judicial districts in the following cases:

"First—From a final judgment rendered in an action or special proceeding commenced therein.

"Second—From a judgment rendered on appeal.

"Third—From an order granting or refusing a new trial, or which affects a substantial right in an action or special proceeding."

Stat. 1851, 108, same as stat. 1853, adding to subdivision 2 thereof, the words, "from a justice's court or a recorder's court, in a case involving the legality of any tax, fees, toll, impost, license, municipal or other fine, or the possession of real property."

24 Cal. 449; 28 Cal. 115; 31 Cal. 81, 261.

CHAPTER IV.

APPEALS FROM PROBATE COURTS.

SECTION 969. When may be taken.
970. Executors and administrators not required to give undertaking on appeal.
971. Acts of acting administrator, etc., not invalidated by reversal of order appointing him.

§ 969. An appeal may be taken to the supreme court, from a judgment or order of the probate court:

1 Granting or revoking letters testamentary, or of administration or of guardianship.

2. Admitting, or refusing to admit, a will to probate.

3. Against or in favor of the validity of a will, or revoking the probate thereof.

4. Against or in favor of setting apart property, or making an allowance for a widow or child.

5. Against or in favor of directing the partition, sale or conveyance of real property.

6. Settling an account of an executor or administrator, or guardian.

7. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy or distributive share.

8. Overruling motion for a new trial.

9. Confirming report of appraiser setting apart the homestead.

Vide § 971 and note.

30 Cal. 105; 34 Cal. 682; 40 Cal. 462.

§ 970. When an executor or administrator who has given an official undertaking appeals from a judgment or order of the probate court made in the proceedings had upon the estate of which he is administrator or executor, his official under-

taking stands in the place of an undertaking on appeal, and the sureties therein are liable as on such undertaking.

Vide § 971 and note.

§ 971. When the order or decree appointing an executor or administrator, or guardian, is reversed on appeal, all lawful acts in administration upon the estate performed by such executor or administrator, or guardian, if he has qualified, are as valid as if such order or decree had been affirmed.

* *Vide* post.

Vide §§ 1713, 1714, 1715.

Stat. 1851, 486, § 294, read: "Appeals shall be allowed from the decisions of the probate court to the district court of the same county, in the following cases: First: on all decisions issuing letters testamentary or of administration or guardianship. Second: on all decrees admitting any will to probate, or determining the validity of any will. Third: on all decrees admitting any will to probate. Fourth: on all orders setting apart property or making allowances for the widow or child or children. Fifth: on all orders for the sale or conveyance of real estate. Sixth: on all settlements of executors or administration or administrators. Seventh: on all orders directing the payment of debts or legacies, or the distribution of the estate among heirs, legatees or distributees. Eighth: on all orders revoking letters testamentary or of administration. Ninth: on any allowance, order, decree, rule, or decision whatever, made by the probate court or judge, manifestly irregular or unjust."

Stat. 1861, 654-5, § 297, read: "An appeal may be taken to the supreme court from an order, decree or judgment of the probate court, when the estate, or amount in dispute, exceeds two hundred dollars, in the following cases:

First. For or against granting or revoking letters testamentary or of administration, *or of guardianship.*

Second. For or against admitting a will to probate.

Third. For or against the validity of a will, or revoking the probate thereof.

Fourth. For or against setting apart property, or making an allowance for a widow or child.

Fifth. For or against directing the sale or conveyance of real property.

Sixth. On the settlement of *any account* of an executor or administrator *or guardian.*

Seventh. For or against declaring, allowing or directing the payment of a debt, claim, legacy or distributive share."

Stat. 1855, omitted words in *italics.*

Stat. 1855, 301, § 8, read: "§ 298. The appeal may be taken within sixty days after the order, decree or judgment is made and entered in the minutes of the court. It shall be made by filing with the clerk of the probate court a notice stating the appeal from the order, decree or judgment, or some specific part thereof, and by executing an undertaking, or giving surety on such appeal in the same manner and to the same extent as upon an appeal to the supreme court from the district court; Provided, the appeal of an executor or administrator who has given an official bond, shall be complete and effectual without the undertaking; Provided, also, from an order, decree or judgment made since the first day of October, one thousand eight hundred and fifty-four; the appeal may be taken within sixty days after the passage of this act. After the appeal is determined, suit may be brought and prosecuted to judgment on the undertaking in the name of the party beneficially interested therein."

Stat. 1855, 301, § 10, read: "§ 299. When a party who has a right to appeal wishes a statement of the case to be annexed to the record, he shall prepare and file the same within twenty days after the entry of the order,

decree or judgment; Provided, if the order, decree or judgment has been made since the first day of October, one thousand eight hundred and fifty-four, he shall prepare and file such statement within twenty days after the passage of this act."

§ 11 made the practice act applicable, when not in conflict with the provisions of this act.

*Stat. 1861, 655, § 114, same as § 971, adding the words "when any executor or administrator resigns or is removed, a successor may be appointed, if a necessity therefor exists, without again proving the death and residence of the testator or intestate."

CHAPTER V.

APPEALS TO COUNTY COURTS.

SECTION 974. Appeal from judgment of justices' or police courts.
975. Party appealing on questions of law alone must prepare a statement. Settlement of statement.
976. If the appeal be upon questions of fact, or of law and fact, no statement need be made.
977. Upon the appeal, the justice must transmit the case to the county court.
978. Undertaking on appeal. Justification of sureties.
979. On filing undertaking, execution must be stayed.
980. Miscellaneous provisions on trials in county courts.

§ 974. (§ 624.) Any party dissatisfied with a judgment rendered in a *civil action in a police or* justice's court, may appeal therefrom to the county court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice *or judge*, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

Vide § 976 and note.
Stat. 1854, 70.
Stat. 1855, 230, omitted all after the words "rendition of the judgment;" also the *italicised* words; and read "ten" instead of "thirty."
Stat. 1951, 150, read: "Any party dissatisfied with a judgment made in a justice's court, may appeal therefrom to the county court of the county, any time within three months after the rendition of the judgment."

8 Cal. 245; 16 Cal. 368; 23 Cal. 136.

§ 975. (§ 625.) When a party appeals to the county court on questions of law alone, he must, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice *or judge*. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to

explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice *or judge*, and if no amendments be filed, the original statement stands as adopted. The statement thus adopted or as settled by the justice *or judge*, with a copy of the docket of the justice *or judge;* and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the county court.

Stat. 1855, 198.

Stat. 1851, 70, was same as stat. 1855, inserting therein the words "within the time allowed by the previous section to appeal," instead of "within ten days from the rendition of the judgment;" also "within ten days after filing the statements," instead of "within ten days after he receives notice that the statement is filed;" also omitting the words "and all motions filed with him by the parties during the trial, and the notice of appeal."

Stat. 1851, 130 (repealed by stat. 1853, 230), was substantially the same as stat. 1851; but allowed only five days after judgment to prepare and file statement, and five days thereafter to file amendments; and omitted all provisions about the contents of the statement.

§ 976. (§ 626.) When a party appeals to the county court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the county court.

Stat. 1851, 70.

Stat. 1853, 240, read: "An appeal shall be taken by filing a notice of appeal with the justice and serving a copy on the adverse party."

Stat. 1851, 15, added to stat. 1853 the words: "The motion shall state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part."

10 Cal. 19.

§ 977. (§ 627.) Upon receiving the notice of appeal and on payment of the fees of the justice *or judge*, and filing an undertaking as required in the next section, *and after settlement or adoption of statement, if any*, the justice *or judge* must, within five days, transmit to the clerk of the county court: if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal and the undertaking filed; and the justice *or judge* may be compelled

by the county court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice *or judge* by the party or his attorney. In the county court, either party may have the benefit of all legal objections made in the justice's *or police* court.

Stat. 1855, 198.

Stat. 1854, 70, read: "Upon receiving the notice of appeal, and on payment of the fees of the justices, and filing an undertaking as required in the next section, the justice shall transmit to the clerk of the county court, a certified transcript of his docket, the pleadings, the notice of appeal received, and the undertaking filed; and when the appeal is on questions of law alone, the statement is admitted or settled, and justices may be compelled by the county court to transmit such transcript and papers, and may be fined for neglect or refusal to transmit the same."

Stat. 1853, 230, read: "Upon receiving the notice of appeal, and the undertaking, as required in the next section, and on the payment of the costs of the action, the justice shall transmit to the clerk of the county court, a copy of his docket in the case, the undertaking filed, and the notice of appeal."

Stat. 1851, 159, read: "Upon receiving the notice of appeal, and on payment of his fees, and filing an undertaking, as required in the next section, the justice shall transmit to the clerk of the county court, a copy of his docket in the case, and a statement, as admitted or settled, and the notice of appeal received."

5 Cal. 71, 89; 6 Cal. 287; 8 Cal. 517; 9 Cal. 17, 571.

§ 978. (§ 623.) An appeal from a justice's *or police* court is not effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal; or, if a stay of proceedings be claimed in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the county court. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said

action in the county court, and will obey any order made by the court therein. A deposit of the amount of the judgment, including all costs appealed from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice *or judge*, is equivalent to the filing of the undertaking; and in such cases the justice *or judge* must transmit the money to the clerk of the county court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice *or judge* before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

Stat. 1860, 335, was substantially the same, inserting between "court therein" and "a deposit," the words, "the undertaking shall be accompanied by the affidavits of the sureties that they are residents of the county, and are each worth the amount specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; or the bond shall be executed by a sufficient number of sureties who can justify, in the aggregate, to an amount equal to double the amount specified in the bond, or"

Stat. 1855, 198, was same as stat. 1860, omitting therefrom the last sentence commencing, "the adverse party may."

Stat. 1854, 70-1, read: "An appeal from a justice's court shall not be effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on appeal; or if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, when the judgment is for the payment of money, or twice the value of property when the judgment is for the recovery of specific personal property, and shall be to the effect that the appellant will pay the amount of the judgment appealed from, or the amount of any judgment that may be recovered in said action, in the county court, or the value of the property specified in such judgment, as the case may be: *Provided*, the judgment be affirmed by the county court; or if affirmed only in part, then to the extent in which it may be affirmed; or, *provided*, judgment be recovered in the county court, together with the costs on the appeal, if the judgment appealed from be other than for the recovery of money or specific personal property, the amount of the undertaking on appeal to stay proceedings shall be fixed by the justice, and shall be to the effect that the appellant will pay all costs of appeal, and all damages which respondent may sustain thereby; *Provided*, the judgment appealed from be affirmed in whole or in part; or, *provided*, any judgment be recovered by the respondent in the county court, not exceeding the amount specified in the undertaking. The undertaking shall be accompanied by the affidavit of the sureties that they are residents of the county, and are each worth the amount specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; but a deposit of one hundred dollars for the costs, or to stay proceedings, the amount of the judgment appealed from, or the value of the property specified in such judgment, and one hundred dollars in addition, or the amount fixed in the cases above named by the justice, shall be equivalent to filing the undertaking in this action mentioned."

Stat. 1853, 280, read: "An appeal from a justice's court shall not be effectual for any purpose, unless an undertaking be filed with two or more sureties, approved by the justice, in a sum equal to twice the amount of the judgment and costs, when the judgment is for the payment of money; or twice the value of the property added to twice the amount of the costs, when the judgment is for the recovery of specific personal property; and shall be to the effect that the appellant will pay the amount of the judgment appealed from, or the value of the property specified in such judgment, as the case may be; *provided*, the judgment shall be affirmed by the appellate court, together with the costs on the appeal. If the judgment appealed from be other than for the recovery of money or specific personal property, the amount of the undertaking on appeal to stay proceedings shall be fixed by the justice, and shall be to the effect that the appellant will pay all costs on appeal, and all damages which respondent may sustain thereby; *provided*, the judgment appealed from be affirmed."

Stat. 1851, 150, read: "The justice shall not transmit to the county court a copy of the docket, and the statement and notice of appeal, until an undertaking be filed with two or more sufficient sureties thereon, in the sum of one hundred dollars for the payment of the costs; or if a stay of proceedings be claimed in a sum equal to twice the amount of the judgment, for the payment of the costs and the judgment, provided the appeal be affirmed by the county court; or if affirmed only in part, then to the extent in which it may be affirmed."

9 Cal. 571; 32 Cal. 50.

§ 979. (§ 629.) If an execution be issued, on the filing of the undertaking staying proceedings, the justice *or judge* must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

§ 980. (§ 367.) Upon an appeal heard upon a statement of the case, the county court may review all orders affecting the judgment appealed from, and may set aside or confirm, or modify, any or all of the proceedings subsequent to, and dependent upon, such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial must be conducted, in all respects, as trials in the district court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the district court, are applicable to trials on appeal in the county court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the county court, after

notice, may order the appeal to be dismissed. Judgments rendered in the county court on appeal have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the district court.

Stat. 1851, 66.

Stat. 1851, 110, read: "Upon an appeal, the court may review all orders affecting the judgment, and may reverse, affirm, or modify the judgment appealed from; and may set aside, or confirm or modify any or all of the proceedings subsequent to, and dependent upon, such judgment, and may, if necessary or proper, order a new trial."

8 Cal. 517; 17 Cal. 67.

TITLE XIV.

OF MISCELLANEOUS PROVISIONS.

CHAPTER I. PROCEEDINGS AGAINST JOINT DEBTORS.
II. OFFER OF THE DEFENDANT TO COMPROMISE.
III. INSPECTION OF WRITINGS.
IV. MOTIONS AND ORDERS.
V. NOTICES, AND FILING AND SERVICE OF PAPERS.
VI. OF COSTS.
VII. GENERAL PROVISIONS.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

SECTION 989. Parties not summoned in action on joint contract may be summoned after judgment.
990. Summons in that case, what to contain, and how served.
991. Affidavit to accompany summons.
992. Answer, when filed and what it may contain.
993. What constitute the pleadings in the case.
994. Issues, how tried. Verdict, what to be.

§ 989. (§ 363.) When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in section four hundred and fourteen, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

§ 990. (§ 369.) The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint.

§ 991. (§ 370.) The summons must be accompanied by an affidavit of the plaintiff, his agent, representative or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

§ 992. (§ 371.) Upon such summons, the defendant may answer within the time specified therein, denying the judgment or setting up any defence which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations.

§ 993. (§ 372.) If the defendant, in his answer, deny the judgment, or set up any defence which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations.

§ 994. (§ 373.) The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him it must be for *not exceeding* the amount remaining unsatisfied on such original judgment, with interest thereon.

CHAPTER II.

OFFER OF THE DEFENDANT TO COMPROMISE.

SECTION 997. Proceedings on offer of the defendant to compromise after suit brought.

§ 997. (§ 390.) The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

6 Cal. 607; 17 Cal. 562.

CHAPTER III.

INSPECTION OF WRITINGS.

SECTION 1000. A party may demand inspection and copy of a book, paper, etc.

§ 1000. (§ 446.) Any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document or paper, in his possession or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing, for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness.

5 Cal. 290; 40 Cal. 636.

CHAPTER IV.

MOTIONS AND ORDERS.

SECTION 1003. Order and motion defined.
1004. Motions and orders, where made.
1005. Notice of motion, at what time to be given.
1006. Transfer of motions and orders to show cause.
1007. Order for payment of money, how enforced.

§ 1003. (§ 515.) Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

12 Cal. 440; 14 Cal. 668; 30 Cal. 530, 560.

§ 1004. (§ 516.) Motions must be made in the county in which the action is pending, or in an adjoining county in the same *judicial* district. *Orders made out of court may be made by the judge of the court in any part of the state.*

Stat. 1851, 132, read "brought" instead of "pending."
32 Cal. 658; 35 Cal. 691.

§ 1005. (§ 517.) When a written notice of a motion is necessary, it must be given, if the court is held in the same district with both parties, five days before the time appointed for the hearing; otherwise ten days. *When the notice is served by mail the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all ninety days;* but the court, or judge, or county judge, may prescribe a shorter time.

Stat. 1853, 278.

Stat. 1851, 132, instead of the last sentence read "but the court or judge may, by an order to show cause, prescribe a shorter time;" also omitted the words in *italics*.

22 Cal. 479; 30 Cal. 123; 35 Cal. 469.

§ 1006. (§ 518.) When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.

§ 1007. (N. S.) Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

SECTION 1010. Notices and papers, how served.
1011. When and how served.
1012. Service by mail, when.
1013. Service by mail, how.
1014. Appearance. Notices after appearance.
1015. Service on non-residents. Where a party has an attorney, service shall be on such attorney.
1016. Preceding provisions not to apply to proceeding to bring party into contempt.
1017. Service by telegraph.

§ 1010. (§ 519.) Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code.

Stat. 1851, 133, read: "Written notices and other papers, when required to be served on the party or an attorney, shall be served in the manner prescribed in the next three sections, when not otherwise provided; but nothing in this title shall be applicable to original or final process, or any proceedings to bring a party into contempt."

§ 1011. (§ 520.) The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the post-office, directed to such attorney.

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelop, into the post-office, directed to such party.

6 Cal. 55; 22 Cal. 650; 28 Cal. 151; 32 Cal. 475; 34 Cal. 640; 35 Cal. 184

§ 1012. (§ 521.) Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

30 Cal. 82; 35 Cal. 186.

§ 1013. (§ 522.) In case of service by mail the notice or other paper must be deposited in the post-office addressed to the person on whom it is to be served, at his place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address, such extension, however, not to exceed ninety days in all.

Stat. 1861, 497, read: "In case of service by mail, the notice, or other paper, shall be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. And in such case, the time of service shall be increased one day for every twenty-five miles distance between the place of deposit and the place of address; provided, that service in any case shall be deemed complete at the end of ninety days from the date of its deposit in the post-office."

Stat. 1851, 133, same as stat. 1861, inserting "twenty" instead of "twenty-five;" also omitting the proviso.

23 Cal. 152.

§ 1014. (§ 523.) A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

4 Cal. 120; 8 Cal. 339; 13 Cal. 558; 16 Cal. 160; 27 Cal. 297; 28 Cal. 649; 29 Cal. 147; 30 Cal. 439.

Appearance by attorney: 4 Cal. 280; 13 Cal. 191; 17 Cal. 431; 21 Cal. 51; 30 Cal. 192.

§ 1015. (§ 524.) When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpœnas, of writs and other process issued in the suit, and of papers to bring him into contempt.

§ 1016. (§ 519.) The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

Vide note to § 101 *l*, *supra*.

§ 1017. Any *summons*, writ or order, in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect, in all respects, as the original thereof might be if delivered to him, and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S.," or by the word "seal."

Stat. 1862, 292, §§ 17 and 18.

CHAPTER VI.

OF COSTS.

SECTION 1021. Compensation of attorneys. Costs to parties
1022. When allowed, of course, to the plaintiff.
1023. Several actions brought on a single cause of action can carry costs in but one.
1024. Defendant's costs must be allowed, of course, in certain cases.
1025. Costs, when in the discretion of the court.
1026. When the several defendants are not united in interest, costs may be severed.
1027. Costs of appeal discretionary with the court, in certain cases.
1028. Referee's fees.
1029. Continuance, costs may be imposed as condition of.
1030. Costs when a tender is made before suit brought.
1031. Costs in action by or against an administrator, etc.
1032. Costs in a review other than by appeal.
1033. Filing of, and affidavit, to bill of costs.
1034. Costs on appeal, how claimed and recovered.
1035. Interest and costs must be included by the clerk in the judgment.
1036. When plaintiff is a non-resident or foreign corporation, defendant may require security for costs.
1037. If such security be not given, the action may be dismissed.
1038. Costs when state is a party.
1039. Costs when county is a party.

§ 1021. (§ 494.) The measure and mode of compensation of attorneys and counsellors *at law* is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursments, as hereinafter provided.

Stat. 1855, 250, substituted for the last clause, the words: "But there shall be allowed to the prevailing party in any action in the supreme court, district courts, superior court of the city of San Francisco, and county courts, his costs and necessary disbursements in the action or special proceeding in the nature of the action."

Stat. 1853, 277, substituted for the last clause, the words: "But there shall be allowed to the prevailing party in any action in the supreme court, district courts, or superior court of the city of San Francisco, and in all actions originally instituted in the county courts, certain sums by way of indemnity for his expenses in the action, or special proceedings in the nature of an action, which allowances are in this act termed costs."

Stat. 1851, 128, was same as stat. 1851, omitting the words "in any action in the supreme court, district courts or superior court of the city of San Francisco, and in all actions originally instituted in the county courts."

1 Cal. 331; 2 Cal. 507: 3 Cal. 108; 5 Cal. 417, 492; 11 Cal. 103; 29 Cal. 281; 36 Cal. 230.

§ 1022. (§ 495.) Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property.

2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court or referee by whom the action is tried.

3. In an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over.

4. In a special proceeding.

5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine.

Stat. 1869-70, 65, added to subdivision 4 the words "in the nature of an action."

Stat. 1865-66, 847, added to subdivision 4 the words added thereto by stat. 1869-70; omitted subdivision 5; read "when," instead of "where," in subdivision 2; also, "where" for "when," in subdivision 3.

Stat. 1853, 278, was same as stat. 1865-66, inserting "two hundred," instead of "three hundred," in subdivisions 2 and 3.

Stat. 1851, 129, was same as stat. 1853, but read "over two hundred dollars," instead of "two hundred dollars or over," in subdivisions 2 and 3

SUB-DIVISION 1: 10 Cal. 217; 30 Cal. 547.

SUB-DIVISION 2: 5 Cal. 267; 23 Cal. 31.

SUB-DIVISION 3: 6 Cal. 286.

§ 1023. (§ 496.) When several actions are brought on one bond, undertaking, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action,

openly within this state; but the disbursements of the plaintiff must be allowed to him in each action.

5 Cal. 61; 18 Cal. 219.

§ 1024. (§ 497.) Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings.

Stat. 1851, 129, added the words "in the nature of an action."

§ 1025. (§ 498.) In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars.

Stat. 1865-66, 847.

Stat. 1851, 129, read "two hundred, instead of "three hundred."

6 Cal. 286; 17 Cal. 336-39; 25 Cal. 282; 28 Cal. 561; 35 Cal. 148; 39 Cal. 667; 40 Cal. 294.

§ 1026. (§ 499.) When there are several defendants in the actions mentioned in section ten hundred and twenty-two, not united in interest, and making separate defences by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

§ 1027. (§ 500.) In the following cases, the costs of appeal is in the discretion of the court:

1. When a new trial is ordered.
2. When a judgment is modified.

1 Cal. 51; 2 Cal. 239; 11 Cal. 341; 13 Cal. 58; 18 Cal. 639; 34 Cal. 350; 28 Cal. 129; 39 Cal. 458.

§ 1028. (§ 504.) The fees of referees are five dollars to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed.

§ 1029. (§ 505.) When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Stat. 1855, 251.

Stat. 1851, 130, read "to the adverse party of a sum not exceeding twenty dollars, besides the fees of witnesses," instead of "costs occasioned by the postponement," also omitted "in the discretion of the court or referee."

§ 1030. (§ 506.) When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

25 Cal. 502; 28 Cal. 238; 32 Cal. 168.

§ 1031. (§ 507.) In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must by the judgment, be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defence.

6 Cal. 169.

§ 1032. (§ 508.) When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

§ 1033. (§ 510.) The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk of the court, within two days after the verdict or decision of the court, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memoran-

dum must be verified by the oath of the party or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding.

Stat. 1855, 251.

Stat. 1851, 131, read: "The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court a memorandum of the items of the costs to which he is entitled. He may include in the costs all the necessary disbursements in the action or proceeding, including the fees of officers allowed by law, the fees of witnesses, the necessary expenses, taking depositions by commission or otherwise, the compensation of referees, and the fees paid on the commencement of the action, or on filing the notice of appeal. The memorandum shall be accompanied by the affidavit of the party, that the items are correct to the best of his knowledge and belief, and that the disbursements have been necessarily incurred in the action. The memorandum and affidavit shall be delivered to the clerk within twenty-four hours after the rendition of the verdict, or the costs shall be deemed waived."

3 Cal. 115; 11 Cal. 341; 16 Cal. 403; 21 Cal. 143; 24 Cal. 350; 28 Cal. 245.

§ 1034. (§ 665.) Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment.

Stat. 1854, 73, § 77, read: "Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same on filing a remittitur with the clerk of the court below, and it shall be the duty of such clerk whenever the remittitur is filed, to issue the execution upon application therefor; and whenever costs are awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment."

14 Cal. 241; 20 Cal. 51; 24 Cal. 350.

§ 1035. (§ 511.) The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank, left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

Stat. 1861, 494.

Stat. 1851, 132, read: "The clerk shall include in the judgment entered up by him, the costs, the percentage allowed, and any interest on the verdict from the time it was rendered."

16 Cal. 403; 30 Cal. 78, 547; 33 Cal. 677; 37 Cal. 202.

§ 1036. (§ 512.) When the plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

19 Cal. 77.

§ 1037. (§ 514.) After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

§ 1038. (N. S.) When the state is a party, and costs are awarded against it, they must be paid out of the state treasury.

§ 1039. (N. S.) When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

CHAPTER VII.

GENERAL PROVISIONS.

SECTION 1045 Lost papers, how supplied.
1046. Papers without the title of the action, or with defective title, may be valid.
1047. Successive actions on the same contract, etc.
1048. Consolidation of several actions into one.
1049. Actions, when deemed pending.
1050. Actions to determine adverse claims, and by sureties.
1051. Testimony, when to be taken by the clerk.
1052. The clerk must keep a register of actions.
1053. Two of three referees, etc., may do any act.
1054. The time within which an act is to be done may be extended.
1055. Actions against a sheriff for official acts.
1056. Actions may be prosecuted in the Spanish language in certain counties.
1057. Undertakings mentioned in this code, requisites of.
1058. People of state not required to give bonds when state is a party.

§ 1045. (N. S.) If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

§ 1046. (§ 531.) An affidavit, notice or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

2 Cal. 94.

§ 1047. (§ 525.) Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

§ 1048. (§ 526.) Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

§ 1049. (N. S.) An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

§ 1050. (§ 527.) An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety.

5 Cal. 82; 13 Cal. 596; 24 Cal. 158.

§ 1051. (§ 633.) On the trial of an action in a court of record, *if there is no short hand reporter of the court in attendance*, either party may require the clerk to take down the testimony in writing.

Stat. 1854, 73, § 75.

1 Cal. 462, 470; 2 Cal. 54, 161; 14 Cal. 38.

§ 1052. (§ 528.) The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

§ 1053. (§ 529.) When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.

§ 1054. (§ 530.) When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, the time allowed by this code may, before the time expires, be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof, but such extension cannot exceed twenty days.

Stat. 1861, 591, read: "The time within which an act is to be done, as provided in this act, shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded. When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, or the preparation of statements, or of bills of exceptions, or of amendments thereto, the time allowed by this act may be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof, or in the absence of such judge from the county in which the action is pending, by the county judge;

but such extension shall not exceed thirty days beyond the time prescribed by this act, without the consent of the adverse party."

Stat. 1851, 104, read: "The time within which an act is to be done, as provided in this act, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded."

27 Cal. 166.

§ 1055. (§ 645.) If an action is brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein is conclusive evidence of his right to recover against such sureties; and the court, or judge in vacation, may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

21 Cal. 438; 28 Cal. 101.

§ 1056. (§ 646.) In the counties of Monterey, San Luis Obispo, Santa Barbara, Los Angeles and San Diego, if the defendant requires it, a copy of the summons or other process in the Spanish language must be delivered to him; and in the counties of Santa Barbara, San Luis Obispo, Los Angeles, San Diego and Monterey, with the consent of both parties, the process, pleadings and other proceedings in a cause, may be in the Spanish language.

Stat. 1862, 567, inserted the words "it shall be the duty of the officer to give the defendant, in a civil action, if said defendant shall require it" instead of "if the defendant requires it;" also omitted the words "must be delivered to him;" also inserted "it shall be lawful" between "Monterey" and "with the consent;" also "to have" between "both parties" and "the process;" also omitted the words "may be."

Stat. 1857, 29, was same as stat. 1862, adding the counties of Santa Clara, Santa Cruz and Contra Costa in the first clause; and Santa Cruz in the last clause.

Stat. 1851, 152, was same as stat. 1857, omitting from the last clause thereof, Monterey, and Santa Cruz; also prefixing the words "whenever a summons or other process, is served upon a party who is unable to read, or who does not understand the English language, it shall be the duty of the officer making the service to explain to such party, the nature of the summons, or other process."

§ 1057. (§ 650.) In all cases where an undertaking with sureties is required by the provisions of this code, the officer taking the same must require the sureties to accompany it with an affidavit that they are each *residents and householders or freeholders within the state, and are each* worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; but

when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

Stat. 1854, 71, § 62, read "the judge, justice, clerk or other officer" instead of "the officer."

Applied to guardians by § 1809.

2 Cal. 562; 7 Cal. 514; 13 Cal. 606; 28 Cal. 12.

§ 1058. In any civil action or proceeding wherein the state or the people of the state is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city or town, is a party plaintiff or defendant, no bond, written undertaking or security can be required of the state or the people thereof, or any officer thereof, or of any county, city or town; but on complying with the other provisions of this code, the state or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies and benefits as if the bond, undertaking or security were given and approved as required by this code.

Vide stat. 1863-64, 261.

Also stat. 1856, 26.

Also stat. 1859, 223.

PART III.

OF SPECIAL PROCEEDINGS

OF A CIVIL NATURE.

TITLE I. OF WRITS OF MANDATE AND PROHIBITION. §§ 1067–1110.

TITLE II. OF CONTESTING ELECTIONS. §§ 1111–1127.

TITLE III. OF SUMMARY PROCEEDINGS. §§ 1132–1178.

TITLE IV. OF ENFORCEMENT OF LIENS. §§ 1180–1206.

TITLE V. OF CONTEMPT. §§ 1209–1222.

TITLE VI. OF VOLUNTARY DISSOLUTION OF CORPORATIONS. §§ 1227–1233.

TITLE VII. OF EMINENT DOMAIN. §§ 1237–1263.

TITLE VIII. OF ESCHEATED ESTATES. §§ 1269–1272.

TITLE IX. OF CHANGE OF NAMES. §§ 1275–1278.

TITLE X. OF ARBITRATIONS. §§ 1281–1290.

TITLE XI. OF PROCEEDINGS IN PROBATE COURTS. §§ 1298–1346.

TITLE XII. OF SOLE TRADERS. §§ 1811–1821

PRELIMINARY PROVISIONS.

SECTION 1063. Parties, how designated.
1064. Judgment and order same meaning as in civil actions.

§ 1063. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party, as the defendant.

Vide § 308.

§ 1064. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

Vide §§ 577-1003.

TITLE I.

OF WRITS OF REVIEW, MANDATE AND PROHIBITION.

CHAPTER I. WRIT OF REVIEW.
II. WRIT OF MANDATE.
III. WRIT OF PROHIBITION.
IV. WRITS OF REVIEW, MANDATE AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.
V. RULES OF PRACTICE AND APPEALS.

CHAPTER I.

WRIT OF REVIEW.

SECTION 1067. Writ of review defined.
1068. When and by what courts granted.
1069. Application for, how made.
1070. The writ to be directed to the inferior tribunal, etc.
1071. Contents of the writ.
1072. Proceedings in inferior court may be stayed, or not.
1073. Service of the writ.
1074. The review under the writ, extent of.
1075. A defective return of the writ may be perfected. Hearing and judgment.
1076. Copy of judgment must be sent to the inferior tribunal.
1077. Judgment rolls.

§ 1067. (§ 455.) The writ of certiorari *must hereafter be known* as the writ of review.

Stat. 1851, 122, read "may be denominated."

§ 1068. (§ 456.) A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

Stat. 1851, 122, read: "This writ may be granted on application, by any court of this state, except a justice's, recorder's, or mayor's court; the writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy."

1 Cal. 152, 181; 2 Cal. 263; 4 Cal. 185; 5 Cal. 476; 7 Cal. 113, 244; 8 Cal. 58; 10 Cal. 346; 14 Cal. 479; 18 Cal. 49; 19 Cal. 78; 21 Cal. 166; 22 Cal. 465; 23 Cal. 492; 25 Cal. 94; 28 Cal. 115; 30 Cal. 58; 35 Cal. 269; 39 Cal. 570; 40 Cal. 344, 479, 481, 642.

As to jurisdiction, see §§ 43, 57, and 85.

§ 1069. (§ 457.) The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

§ 1070. (§ 458.) The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

32 Cal. 582; 34 Cal. 352.

§ 1071. (§ 459.) The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

§ 1072. (§ 460.) If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court; but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

§ 1073. (§ 461.) The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

§ 1074. (§ 462.) The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

14 Cal. 479; 29 Cal. 459, 632; 35 Cal. 289.

§ 1075. (§ 463.) If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below.

32 Cal. 50, 582.

§ 1076. (§ 464.) A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceeding certified up.

§ 1077. (§ 465.) A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

Stat. 1851, 124, added the words: "If the proceeding be had in any other than the supreme court, an appeal may be taken from the judgment in the same manner, and upon the same terms, as from a judgment in a civil action."

CHAPTER II.

WRIT OF MANDATE.

SECTION 1084. Mandate defined.
1085. When and by what court issued.
1086. Writ, when and upon what to issue.
1087. Must be either alternative or peremptory. Substance.
1088. If the application be without notice, the alternative writ may issue; otherwise, the peremptory. Notice and default.
1089. The adverse party may answer under oath.
1090. If an essential question of fact is raised, the court may order a jury trial.
1091. The applicant may demur to the answer or countervail it by proof.
1092. Motion for new trial, where made.
1093. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion.
1094. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.
1095. If the applicant succeed, he may have damages, costs and a peremptory mandate
1096. Service of the writ.
1097. Penalty for disobedience to the writ.

§ 1084. (§ 466.) The writ of mandamus *must hereafter be designated* the writ of mandate.

Stat. 1851, 124, read "may be denominated."

§ 1085. (§ 437.) It may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Stat. 1851, 124, read: "Justice's, recorder's or mayor's" instead of "justice's or police."

1 Cal. 143; 2 Cal. 165, 245; 3 Cal. 167; 4 Cal. 176; 6 Cal. 254, 440; 7 Cal. 130, 286; 11 Cal. 42; 16 Cal. 11; 17 Cal. 132; 20 Cal. 72, 318; 21 Cal. 419, 668; 22 Cal. 34; 24 Cal. 78; 25 Cal. 26, 652; 27 Cal. 655; 28 Cal. 633; 30 Cal. 244, 325, 435, 596, 645; 31 Cal. 215; 33 Cal. 487; 35 Cal. 213; 36 Cal. 283; 39 Cal. 189, 411, 593.

Where writ will not lie: 1 Cal. 152; 10 Cal. 376; 14 Cal. 230; 29 Cal. 307; 28 Cal. 166; 30 Cal. 244; 37 Cal. 532; 39 Cal. 411.

See authorities under next section.

As to jurisdiction, see §§ 43, 57 and 85.

§ 1086. (§ 468.) The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

2 Cal. 594; 3 Cal. 167; 4 Cal. 176; 7 Cal. 130, 276; 9 Cal. 7, 18; 10 Cal. 211; 14 Cal. 640; 15 Cal. 149; 20 Cal. 72; 22 Cal. 34, 142; 24 Cal. 78; 26 Cal. 641; 29 Cal. 210, 427; 36 Cal. 283, 595; 40 Cal. 278.

§ 1087. (§ 469.) The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted.

1 Cal. 143.

§ 1088. (§ 470.) When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

§ 1089. (§ 471.) On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

Stat. 1851, 125, inserted "or such further day as the court may allow," between "noticed" and "the party."

27 Cal. 665; 30 Cal. 244.

§ 1090. (§ 472.) If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

2 Cal. 165; 9 Cal. 19; 30 Cal. 325.

§ 1091. (§ 473.) On the trial, the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance.

§ 1092. (§ 474.) The motion for new trial must be made in the court in which the issue of fact is tried.

Stat. 1851, 125, read: "If either party be dissatisfied with the verdict of the jury, he may move for a new trial upon a statement prepared as provided in section one hundred and ninety-five. The motion for a new trial may, upon reasonable notice, be brought on before the judge of the court in which the cause was tried, either in term or vacation. If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party, a new trial shall not be had."

§ 1093. (§ 475.) If no notice *of a motion* for a new trial be given, or, if given, *the motion* be denied, the clerk, within five days after rendition of the verdict or denial of the motion,

must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

§ 1094. (§ 476.) If no answer be made, the case must be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section ten hundred and eighty-eight, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing, the argument of the case.

§ 1095. (§ 477.) If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.

§ 1096. (§ 478.) The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. *Service upon a majority of the members of any board or body, is service upon the board or body, whether at the time of the service the board or body was in session or not.*

§ 1097. (§ 479.) When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court that any member of such tribunal, corporation or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three

months, and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a judge or officer who draws a salary from the state or county, a certified copy of the order must be forwarded to the controller or county treasurer, as the case may be, and the amount thereof may be retained from the salary of such judge or officer.

Stat. 1851, 126, added the words "such judge or officer for his wilful disobedience shall also be deemed guilty of a misdemeanor in office."

1 Cal. 188: 16 Cal. 11.

CHAPTER III.

WRIT OF PROHIBITION.

SECTION 1102. Prohibition defined.
1103. Where and when issued.
1104. Writ may be alternative or peremptory. Form of.
1105. Certain provisions of the preceding chapter applicable.

§ 1102. (N. S.) The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

§ 1103. (N. S.) It may be issued by any court except police or justices' courts, to an inferior tribunal or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

30 Cal. 244.

As to jurisdiction, see §§ 43, 67 and 85.

§ 1104. (N. S.) The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

§ 1105. (N. S.) The provisions of the preceeding chapter, except of the four first sections thereof, apply to this proceeding.

CHAPTER IV.

WRITS OF REVIEW, MANDATE AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

SECTION 1108. Writs of review, mandate and prohibition may issue and be heard at chambers.

§ 1108. (§ 653.) Writs of review, mandate and prohibition may be issued by any three of the justices of the supreme court, or by any district or county judge, in vacation, and may, in the discretion of the justices or judge issuing the writ, be made returnable and a hearing thereon be had in vacation.

Vide §§ 143 and 165.

Stat. 1854, 72, § 65, read: "Writs of certiorari and mandamus, may be issued in the cases prescribed by said act, by a judge of the supreme court, district court, or county court, in vacations, and may in the discretion of the judge issuing the writ, be made returnable, and a hearing may be had on the return thereof in the vacation"

CHAPTER V.

RULES OF PRACTICE AND APPEALS.

SECTION 1109. Certain provisions of part two applicable.
1110. Same.

§ 1109. Except as otherwise provided in this title the provisions of Part II, of this code, are applicable to, and constitute the rules of practice in the proceedings mentioned in this title.

§ 1110. The provisions of Part II, of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title.

TITLE II.

OF CONTESTING CERTAIN ELECTIONS.

SECTION 1111. Who may contest, and grounds of contest
1112. Irregularity and improper conduct of judges, when to annul elections.
1113. When not to.
1114. Illegal votes, when not to vitiate election.
1115. Proceedings on contest.
1116. Statement of cause of contest. When based on reception of illegal votes, contestant to deliver to respondent a list of votes claimed to be illegal.
1117. Statement of cause of contest; want of form not to vitiate.
1118. County judge to hold special term for trial of contest.
1119. Clerk to issue citation to respondent.
1120. Witnesses—attendance of, how enforced.
1121. Power of court. Adjournment of court.
1122. Rules to govern court in trial of contest.
1123. Court may declare who was elected.
1124. Fees of officers and witnesses.
1125. Costs.
1126. Appeal.
1127. When election void and office vacant.

§ 1111. Any elector of the county may contest the right of any person declared elected to an office to be exercised in and for such county; and, also, any elector of a township may contest the right of any person declared elected to any office in and for such township, for any of the following causes:

1. For malconduct on the part of the board of judges, or any member thereof.

2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office.

3. When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or has offered any such bribe or reward for

the purpose of procuring his election, *or has committed any other offence against the elective franchise defined in Title IV, Part I, of the penal code.*

4. On account of illegal votes.

Stat. 1850, 101, § 51, omitted the words in *italics* and inserted an additional subdivision, in the following words: "When the person whose right is contested shall have been, previous to such election, convicted of an infamous crime by any court of competent jurisdiction, such conviction not having been reversed, nor such person relieved from the legal infamy of such conviction."

Generally: 13 Cal. 145; 23 Cal. 314; 24 Cal 449; 28 Cal. 123; 30 Cal. 325; 31 Cal. 82; 34 Cal. 635.

SUB-DIVISION 1: 2 Cal. 135; 12 Cal. 352; 26 Cal. 161; 31 Cal. 82.

SUB-DIVISION 3: 27 Cal. 655.

SUB-DIVISION 4: 14 Cal. 479; 28 Cal. 123; 34 Cal. 273.

§ 1112. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes.

Stat. 1850, 101, § 52, substantially the same.

12 Cal. 352; 31 Cal. 173; 34 Cal. 273, 635.

§ 1113. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of judges of any township election, or any member thereof, the election cannot be annulled and set aside upon any proof thereof, unless the rejection of the vote of such township or townships would change the result as to such office in the remaining vote of the county.

Stat. 1850, 101, § 53.

20 Cal. 50; 31 Cal. 173.

§ 1114. Nothing in the fourth ground of contest, specified in section eleven hundred and eleven, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the

same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

Stat. 1850, 101, § 54.

§ 1115. When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of the election, file with the county clerk a written statement, setting forth specifically:

1. The name of the party contesting such election, and that he is an elector of the district, county or township, as the case may be, in which such election was held.

2. The name of the person whose right to the office is contested.

3. The office.

4. The particular grounds of such contest.

Which statement must be verified by the affidavit of the contesting party, that the matters and things therein contained are true.

Stat. 1851, 182, § 10, substantially the same, adding the words "as he verily believes."

15 Cal. 117; 30 Cal. 393; 31 Cal. 261.

§ 1116. When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally, that in one or more specified townships, illegal votes were given to the person whose election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony can be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such lists.

Stat. 1850, 101, § 57, substantially the same.

30 Cal. 393.

§ 1117. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such cer-

tainty as will advise the defendant of the particular proceeding or cause for which such election is contested.

Stat. 1850, 101, § 58, substantially the same.

§ 1118. Upon the statement being filed, the county clerk must inform the judge of the county court, who must give notice and order a special term of court to be held at the court house of the proper county, on some day to be named by him, not less than ten nor more than twenty days from the date of such notice, to hear and determine such contested election.

Stat. 1855, 161, § 8.

13 Cal. 145; 23 Cal. 123.

§ 1119. The clerk must also, at the same time, issue a citation for the person whose right to the office is contested, to appear at the time and place specified in the notice, which citation must be delivered to the sheriff and be served upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided.

Stat. 1850, 101, § 60.

34 Cal. 635.

§ 1120. The clerk must issue subpœnas for witnesses at the request of either party, which must be served as other subpœnas; and the county court has full power to issue attachments to compel the attendance of witnesses who have been subpœned to attend.

Stat. 1855, 161, § 9, substantially the same

§ 1121. The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance.

Stat. 1850, 101, § 62.

34 Cal. 635.

§ 1122. The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable; and may dismiss

the proceedings if the statement of the cause or causes of the contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election.

Stat. 1850, 101, § 83, added "according to the law and right of the case." 12 Cal. 352; 34 Cal. 635.

§ 1123. If in any such case it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected.

Stat. 1850, 101, § 64.

§ 1124. The clerk, sheriff and witnesses shall receive, respectively, the same fees, from the party against whom judgment is given, as are allowed for similar services in the district court.

Stat. 1850, 101, § 65.

§ 1125. If the proceedings are dismissed for insufficiency, or want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same. *Primarily*, each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in the district court.

Stat. 1850, 101, §§ 66, 67, 68.

§ 1126. Either party, aggrieved by the judgment of the court, may appeal therefrom to the supreme court, as in other cases of appeal thereto from the county court.

Stat. 1855, 161, § 10.

§ 1127. Whenever an election is annulled or set aside by the judgment of the county court, and ten days has elapsed and no appeal has been taken, the commission, if any has issued, is void and the office vacant.

Stat. 1555, 161, § 11, substantially the same.

TITLE III

OF SUMMARY PROCEEDINGS.

CHAPTER I. CONFESSION OF JUDGMENT WITHOUT ACTION.
II. SUBMITTING A CONTROVERSY WITHOUT ACTION.
III. DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.
IV. SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES.

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

SECTION 1132. Judgment may be confessed for debt due or contingent liability.
1133. Statement in writing and form thereof.
1134. Filing statement and entering judgment.
1135. How, in justices' courts.

§ 1132. (§ 374.) A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. *Such judgment may be entered in any court having jurisdiction for like amounts.*

1 Cal. 48; 5 Cal. 514; 6 Cal. 238; 12 Cal. 128, 218; 13 Cal. 76; 19 Cal. 278; 27 Cal. 228.

§ 1133. (§ 375.) A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum.

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

6 Cal. 419; 62 Cal. 133, 143; 18 Cal. 576; 20 Cal. 681; 27 Cal. 233. 37 Cal. 328.

§ **1134.** (§ 376.) The statement must be filed with the clerk of the *court* in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, thereupon becomes the judgment roll.

Stat. 1851, 111, read "the county" instead of "the court."

§ **1135.** (§ 536.) In a justice's court, where the court has authority to enter the judgment, the statement may be filed with the justice, who must thereupon enter in his docket a judgment of his court for the amount confessed, with three dollars costs. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.

Stat. 1851, 135, read: "Judgment upon confession may be entered up in any justice's court in the state specified in the confession."

CHAPTER II.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

SECTION 1138. Controversy, how submitted without action.
1139. Judgment on, as in other cases, but without costs prior to notice of trial.
1140. Judgment may be enforced or appealed from as in an action.

§ 1138. (§ 377.) Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

20 Cal. 72, 673.

§ 1139. (§ 378.) Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission and a copy of the judgment constitute the judgment roll.

§ 1140. (§ 379.) The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

SECTION 1143. Persons confined may be discharged.
1144. Notice of application.
1145. Service of notice.
1146. Examination before judge.
1147. Interrogatories may be in writing.
1148. Oath to be administered.
1149. Order of discharge.
1150. If not discharged, prisoner may again apply, when.
1151. Discharge final.
1152. Judgment remains in force.
1153. Plaintiff may order discharge of prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.
1154. Plaintiff to advance funds for support of prisoner.

§ 1143. Any person confined in jail on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this chapter specified.

Stat. 1850, 407, § 1.

Stat. 1863, 92, inserted "or order," between "execution" and "issued."

§ 1144. Such person must cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to the judge of the district court of the county in which such person may be confined; or, in case of his absence or inability to act, to the judge of the county court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment.

Stat. 1850, 407, § 2, added the words, "in the county of San Francisco, the application may be made to a judge of the superior court of the city of San Francisco."

§ 1145. Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application.

Stat. 1850, 407, § 3, added the words, "in cases where the plaintiff, his agent or attorney, lives within twenty miles of the place of hearing; and one day shall be added for every additional twenty miles that such person may reside from the place of hearing."

§ 1146. At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

Stat. 1850, 407, § 4.

§ 1147. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

Stat. 1850, 407, § 5.

§ 1148. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him, the following oath, to wit: "I, —— ——, do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to *hinder, delay or* defraud my creditors, so help me God."

Stat. 1850, 407, § 6.

§ 1149. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause.

Stat. 1850, 407, § 7, inserted the words, "if he be imprisoned for no other cause," between "custody" and "and the officer."

§ 1150. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings must thereupon be had.

Stat. 1850, 407, § 8.

§ 1151. The prisoner, after being so discharged, is forever exempted from arrest or imprisonment for the same *debt*, unless he be convicted of having wilfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

Stat. 1850, 407, § 9.

Stat. 1863, 93, § 2, read "cause of action."

§ 1152. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

Stat. 1850, 407, § 10.

§ 1153. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

Stat. 1850, 407, § 11.

§ 1154. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailor, *on such commitment, sufficient money for the support of the prisoner for one week and must make the like advance for every successive week of his imprisonment, and in case of failure to do so* the jailer must forthwith discharge such prisoner from custody; and such discharge has the same effect as if made by order of the creditor.

Stat. 1863, 93, § 3, inserted "or order" between "execution" and "issued;" also instead of the words in *italics*, the following: "within twenty-four hours after such commitment, sufficient money to pay for the support of said prisoner during the time for which he may be imprisoned; and in case the money should not be so advanced, or if, during the time the prisoner may be in confinement, the money should be expended in the support of such prisoner, and the creditor should neglect for twenty-four hours to advance such further sum as might be necessary for his support."

Stat. 1850, 407, § 12, same as stat. 1863, omitting the words "or order."

CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES.

SECTION 1159. Forcible entry defined.
1160. Forcible detainer defined.
1161. Unlawful detainer defined.
1162. Service of notice.
1163. County courts have jurisdiction.
1164. Parties defendant.
1165. Parties generally.
1166. Complaint. Judge to fix day for appearance of defendant and summons.
1167. Summons, form and service of.
1168. Arrest.
1169. Judgment by default.
1170. Defendant may appear, etc.
1171. Trial by jury.
1172. Showing required of plaintiff in forcible entry or detainer. Of defendant.
1173. Complaint must be amended in certain cases.
1174. Verdict and judgment.
1175. Verification of complaint and answer.
1176. Effect of an appeal upon the judgment.
1177. Rules of practice.
1178. Appeals, how taken, etc.

§ 1159. Every person is guilty of a forcible entry who either—

1. By breaking open doors, windows or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or,

2. Who, after entering peaceably upon real property, turns out by force, threats or menacing conduct, the party in possession.

Vide § 1160 and note.

Stat. 1865-66, 768, § 1, read: "If any person shall, with violence and a strong hand, enter upon or into any lands or buildings either by breaking open doors, windows, or other parts of a house, or by any kind of

violence or circumstance of terror, or if any person, after entering peaceably, shall turn out by force or by threats, or by menacing conduct, the party in possession, such person shall be deemed guilty of a forcible entry, and may be proceeded against and punished as hereinafter provided."

Statute generally: 5 Cal. 266; 8 Cal. 499; 9 Cal 46, 572; 12 Cal. 500; 23 Cal. 381; 27 Cal. 502; 29 Cal. 577, 661; 39 Cal. 23.

Parties plaintiff: 3 Cal. 50; 5 Cal. 113; 8 Cal. 499; 16 Cal. 107; 20 Cal. 45, 282.

Parties defendant: *Vide* § 1164.

40 Cal. 351.

When action can be maintained: 5 Cal. 63, 156; 9 Cal. 46; 12 Cal. 500; 23 Cal. 375, 413; 24 Cal. 319; 32 Cal. 340.

When action cannot be maintained: 5 Cal. 156; 23 Cal. 379; 27 Cal. 502; 28 Cal. 527; 29 Cal. 214.

Vide § 1172.

§ 1160. Every person is guilty of a forcible detainer who either—

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

Stat. 1865-66, 768-9, §§ 2 and 3, read: "Sec. 2. If any person shall, by force and with a strong hand, or by menaces and threats of violence unlawfully hold and keep the possession of any lands or tenements, whether the same were acquired peaceably or otherwise, such person shall be deemed guilty of a forcible detainer, and may be proceeded against as herein provided.

"Sec. 3. If any person shall, in the night time, or during the absence of the occupant of any lands or tenements, unlawfully enter upon such land or tenements, and shall, after demand made for the surrender of such premises, for the period of five days, refuse to surrender the same to such former occupant, such person shall be deemed guilty of a forcible detainer, and may be proceeded against as herein provided for such offence; *provided*, that the party shall be deemed the actual occupant of lands who, within five days, preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands or tenements."

Stat. 1863, 632-3, §§ 1 and 2, read: "§ 1. No entry shall be made into any lands, tenements, or other possessions, but in cases where the entry is given by law, and in such case only in a peaceable manner; not with strong hand, nor with a multitude of people.

"§ 2. Where any such forcible entry shall be made, or where the entry shall be made in a peaceable manner, and the possession shall be held by force, the person so forcibly put out, or so forcibly holden out, of possession, shall be restored to such possession by action to be commenced and prosecuted as in this act provided."

SUB-DIVISION 1: 23 Cal. 413; 24 Cal. 317; 29 Cal. 577.

SUB-DIVISION 2: 9 Cal. 48; 24 Cal. 317; 28 Cal. 532; 29 Cal. 220; 37 Cal. 154; 38 Cal. 410, 676; 40 Cal. 351, 484.

§ 1161. A tenant of real property, for a term less than life, is guilty of an unlawful detainer—

1. Where he continues in possession of the property, or any part thereof, after the expiration of his term, without the permission of the landlord; but in case of a tenancy at will or sufferance, it must be first terminated by notice, as prescribed in the civil code.

2. Where he continues in possession after a neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him.

3. Where he continues in possession, without such permission, after default in the payment of rent pursuant to the agreement under which the property is held, and three days' notice, in writing, requiring payment of the rent or possession of the property, shall have been served upon him.

[*Vide* Act of March 11, 1872—following § 1178.]

Stat. 1863, 653, § 3, read: "It shall be unlawful for any person to hold over any lands, tenements, or other possessions, after the termination of the time for which they may have been demised or let to him or her, or to the person under whom he or she holds possession, or contrary to the covenants of the lease or agreement under which he or she holds, or after any rent shall become due according to the terms of such lease or agreement, and shall remain unpaid for the space of three days after the same shall become due as aforesaid."

Stat. 1862, 420, read: "When any person or persons shall hold over any lands, tenements, or other possessions, after the termination of the time for which they are demised or let to him, her, or them, or to the person under whom he, she, or they hold, or after any rent shall become due, according to the terms of such lease or agreement, and shall remain unpaid for the space of three days after demand for payment thereof, in all such cases, if the lessor, his heirs, executors, assigns, agent, or attorney shall make demand, in writing, of such tenant, or tenants that he, she, or they shall deliver the possession of the premises held as aforesaid, and if such tenant, or tenants shall refuse or neglect, for the space of three days after such demands, to quit the possession of such lands and tenements, or to pay the rent thereof, due and unpaid as aforesaid, upon complaint therefor to any justice of the peace of the proper county, the justice shall proceed to hear, try, and determine the

same, in the same manner as in other cases hereinbefore provided for, but shall impose no fine in any such case mentioned in this section. It shall not be necessary, in order to work a forfeiture for nonpayment of rent, to make demand for rent on the day on which the same becomes due, or at any particular time of the day; but demand may be made of the tenant in person, at any time within a year after such rent shall become due according to the terms of any lease or agreement, and may be made for the whole amount due and unpaid at the time of such demand; and the failure on the part of the lessee or his assigns, to pay such rent upon such demand being made, shall have the same force and effect as if demand had been made on the premises, towards sunset on the day when the rent became due. No person, other than actual occupants of the premises, shall be necessary parties defendant to proceedings provided for in this section; and in case a married woman be a tenant or occupant, and her husband is not a resident of the county in which the premises are situated, her marriage shall not be a defense in such proceedings: but in case her husband be not joined, or unless she be doing business as a sole trader, a judgment against her shall only be valid against property on the premises at the time of the trial."

Stat. 1861, 582-3, inserted in stat. 1862, the words "or contrary to the conditions, or covenants of the lease, or agreement, under which he, or she, holds;" omitted the words "after demand for payment thereof;" inserted the word "administrators" between "executors" and "assigns;" and substituted for all after the words "mentioned in this section," the words: "The said demand may be made at any time within a year after the termination of the lease or agreement, or after a breach of the conditions, or covenants, of the lease, or agreement, or after any rent shall become due according to the terms of such lease or agreement, and shall remain unpaid for the space of three days."

Parties plaintiff: 27 Cal. 502; 29 Cal. 168; 31 Cal. 333; 36 Cal. 303.

Notice to quit: 3 Cal. 234; 4 Cal. 208; 6 Cal. 189; 16 Cal. 88; 23 Cal. 227; 29 Cal. 661; 38 Cal. 563; 40 Cal. 246, 284.

§ 1162. The notices required by the preceding section may be served, either:

1. By delivering a copy to the defendant personally; or,

2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place; or,

3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found.

Stat. 1863, 633, §§ 4 and 5, contained the substance of stat. 1862, quoted *supra* in note to § 1161, in regard to demand and forfeiture.

§ 1163. The county court of the county in which the property, or some part of it, is situated, has jurisdiction of proceedings under this chapter.

Stat. 1865-66, p. 768-9, § 4, substantially the same.

Vide note to § 1161.

31 Cal. 122.

§ 1164. No person other than the actual occupants of the premises are necessary parties defendant to these proceedings, nor will the proceeding abate or plaintiff be nonsuited for the nonjoinder of any persons who might or should have been made parties defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offence charged, judgment must be rendered against the persons thus found guilty. And in case a married woman be tenant or occupant, and her husband is not a resident of the county in which the premises are situated, her marriage is no defence; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a judgment against her can only be enforced against property on the premises at the time of the commencement of the action.

Vide § 1161 and note.

Stat. 1865–66, 770–71, § 11, substantially the same.

Stat. 1863, 655, § 12, omitted all between the words "these proceedings" and "and in case."

Parties defendant: 10 Cal. 445; 20 Cal. 48; 29 Cal. 214; 39 Cal. 28.

§ 1165. Except as provided in the preceding section, the provisions of part two of this code, relating to parties to civil actions, are applicable to this proceeding.

Stat. 1865–66, 771, § 13, was substantially the same, adding the words, "*provided*, that no appeal taken by a defendant in such action to the supreme court shall prevent the issuance and execution of the writ of restitution therein, unless the county judge shall, by his written order, direct that such writ of restitution be stayed."

Stat. 1863, 655, § 14, same in substance as § 1165.

§ 1166. The plaintiff must present to the county judge his written complaint, setting forth therein the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may charge that the defendant has acted fraudulently in making the forcible entry or detainer (in case the proceeding is brought for either), and may claim such damages therefor as he may deem proper, and in case of rent due must state the amount thereof. Upon receiving the complaint the judge must fix a day for the appearance of the defendant in such action, and indorse the date thus fixed, together with the day of the presentation of the complaint, upon it; the judge must also direct upon the complaint that the summons

to be issued thereupon be served upon the defendant at a day not less than three days previous to the day set for the appearance of the defendant, and not more than twenty days from the date of making the order, fixing the return day of the summons.

Stat. 1865-66, 769, § 5, inserted the words, "but in such case he shal state the facts constituting the fraud," between "deem proper" and "and in case of rent;" also omitted the words, "and in case of rent due must state the amount thereof."

Stat. 1863, 651, §§ 8 and 9, required the complaint to be verified; and omitted all after the words "amount thereof;" but provided that the complaint might be presented to a county, or district judge, or to any commissioner authorized to do chamber business of a county or district judge."

§ 1167. The complaint, thus indorsed, must be filed with the clerk of the county court, and the clerk must forthwith issue the summons. It must state the parties to the proceeding, the court in which the same is brought, the nature of the proceeding, in concise terms, and the relief sought, and also the day fixed for the appearance of the defendant therein, and the number of days before the time of the appearance that the same is to be served on the defendant. It must notify the defendant to appear and answer within the time designated in the summons, or that the relief sought will be taken against him. The summons must be directed to the defendant, and must be served and returned in the same manner as the summons in a civil action is served and returned.

Stat. 1865-66, 763, § 6, was substantially the same, inserting the words "under the seal of said court" between "summons" and "It must;" and substituting for the last sentence the words: "The summons shall be directed to the defendant and shall be served by the sheriff of the county or other person duly qualified, by delivering to such defendant a certified copy thereof, and the return of the sheriff shall show the day and place at which the same was served."

Statement of case: 4 Cal. 182; 9 Cal. 46; 16 Cal. 73, 107; 23 Cal. 526; 27 Cal. 375; 28 Cal. 170; 31 Cal. 122; 32 Cal. 340; 33 Cal. 410; 40 Cal. 531, 534.

§ 1168. If the complaint presented establishes, to the satisfaction of the judge, fraud, force or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.

Stat. 1865-66, 770, § 8, and addition, made the provisions of the practice act in reference to arrests in civil cases, applicable.

§ 1169. If, at the time appointed, the defendant do not appear and defend, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint.

Vide § 1171 and note.

§ 1170. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

Vide § 1171 and note.

§ 1171. Whenever an issue of fact is presented by the pleadings, if either party demand it, a jury must be summoned to try the issue. The jury must be summoned and formed as in justices' courts, and the provisions of this code, respecting trials by jury in justices' courts, apply to trials by jury under this chapter.

Stat. 1865-66, 767-70, § 7, read "On or before the day set for his appearance therein, the defendant shall file with the clerk, and in said cause, his written answer, demurrer, or demurrer and answer, or other appearance, or if he fail to so appear, the clerk shall note his default, and the judge shall thereupon, upon satisfactory evidence, order such judgment as shall be just in the premises. Whenever an issue of fact is presented by the pleadings, the county judge, upon the application of either party, shall order the clerk to issue a venire for a special trial jury to be summoned for the day fixed by the court for the trial of said cause, etc." It went on to provide for summoning and challenging the jury; that the pleadings be verified, and the proceedings not therein provided for, be regulated by the civil practice act so far as applicable.

§ 1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defence, that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

Stat. 1865-66, 770, § 9.

Possession of plaintiff: 8 Cal. 499; 15 Cal. 315; 16 Cal. 107; 29 Cal. 45, 83; 23 Cal. 523; 27 Cal. 523; 23 Cal. 179, 187; 33 Cal. 533; 37 Cal. 53; 38 Cal. 619, 633; 39 Cal. 639; 40 Cal. 351.

Force: 4 Cal. 176; 6 Cal. 61; 15 Cal. 315; 23 Cal. 527; 29 Cal. 577; 31 Cal. 122; 32 Cal. 340; 33 Cal. 676, 633.

What defendant in forcible entry, etc., may show: 23 Cal. 391; 27 Cal. 568; 28 Cal. 172; 31 Cal. 467; 36 Cal. 590; 38 Cal. 619.

What tenant may show: 8 Cal. 592; 21 Cal. 300; 25 Cal. 35; 34 Cal. 265; 36 Cal. 303.

§ 1173. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible detainer, and other than the offence charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance must be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor.

Stat. 1865-66, 770, § 10.

32 Cal. 340; 38 Cal. 410.

§ 1174. If, upon the trial, the verdict of the jury or the finding of the court is in favor of the plaintiff and against defendant, the clerk must thereupon enter judgment for the restitution of the premises. The jury, or the court, in case the proceeding is tried without jury, must also assess the damages occasioned to the plaintiff by the forcible entry or detainer, *or in case of rent unpaid, the amount of rent then due*, and thereupon judgment against the defendant for three times the amount of such damages *or rent, as the case may be, so found or* assessed, must be entered.

Stat. 1865-66, 771, § 12.

Restitution: 10 Cal. 211; 19 Cal. 375; 39 Cal. 287.

Rent due: 17 Cal. 566; 20 Cal. 232; 21 Cal. 55; 27 Cal. 563; 40 Cal. 246

Damages: 2 Cal. 527; 31 Cal. 467.

Treble damages: 4 Cal. 412; 6 Cal. 63, 169; 15 Cal. 149; 23 Cal. 375; 25 Cal. 264.

§ 1175. The complaint and answer must be verified.

§ 1176. An appeal taken by the defendant does not stay proceedings upon the judgment unless the county judge so directs.

Vide § 1165 and note.

§ 1177. Except as otherwise provided in this chapter the provisions of Part II, of this code, are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter.

Vide note to § 1171.

§ 1178. The provisions of Part II, of this code, relative to new trials and appeals except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

[*An Act to amend an Act entitled "An Act concerning Forcible Entries and Unlawful Detainers, and to repeal all other Acts on the same subject."—Approved April* 27, 1863. *Approved March* 11, 1872—*took effect thirty days after passage.*

SECTION 1. Section nine of said Act is hereby amended so as to read as follows:

SEC. 9. Upon filing with the county clerk of the proper county a complaint duly verified, the clerk shall at the request of the plaintiff or his attorney, issue a summons thereon directed to the defendant, requiring him to appear and answer in said action within three days after service of summons. The summons shall be served by delivering a copy thereof upon the occupant of the premises described in the complaint, or by leaving such copy on the premises in a conspicuous place. Any demurrer or other objection filed before answer may be heard on one day's notice, and a copy of any pleading filed by the defendant shall be served on the same day on the plaintiff or his attorney. If the demurrer be filed on the day for answering it shall be heard at once, or not later than 10 o'clock A.M. of the next day. If the demurrer be overruled, the defendant shall answer on the same day. If it be sustained, the plaintiff shall file an amended complaint within three days thereafter, and the defendant shall answer the same within three days after the service upon him or his attorney of a copy of the same. The answer shall be verified, and shall contain a specific denial of each material allegation of the complaint. At 10 o'clock A. M. on the day after the expiration of the time within which the defendant should answer the original com-

plaint of plaintiff, the county judge shall attend at the county courtroom and open court; and if the defendant shall have failed to answer or demur to the complaint, he shall upon satisfactory proof thereof, order such judgment as shall be just in the premises. If the defendant shall have answered or demurred, the judge shall set a day for the trial of the action, which shall be within not more than two weeks from the day of service of the summons. If a jury shall have been demanded in writing, he shall order the clerk to issue a venire for a special trial jury to be summoned for the day fixed by the court. The jury shall be summoned in the same manner, and possess the qualifications and be subject to the same challenges as provided in section twenty-eight of an Act entitled an "Act concerning Grand and Trial Jurors," approved April twenty-seventh, eighteen hundred and sixty-three. All proceedings other than the trial of the cause may be heard in chambers or in open court. If a jury be demanded, the demand shall be in writing, filed at the time of the issuance of the summons, if demanded by the plaintiff, or at the time of filing the answer or demurrer, if demanded by the defendant, and shall specify the number, not less than three, demanded. If the parties disagree as to the number of the jury, the Court shall determine the same. The demand in all cases shall be accompanied by the proper jury fee, otherwise a jury trial shall be deemed to have been

TITLE IV.

OF THE ENFORCEMENT OF LIENS.

CHAPTER I. LIENS IN GENERAL.
II. LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.
III. CERTAIN LIENS FOR SALARIES AND WAGES

CHAPTER I

LIENS IN GENERAL.

SECTION 1180. Definition of lien

§ 1180. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

CHAPTER II.

LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.

SECTION 1183. What laborers, contractors, etc., may have liens upon.
1184. Liens for grading and filling lots and streets.
1185. What interest in the land subject to the lien.
1186. Effect of liens.
1187. Claim of lien to be filed in recorder's office
1188. Liens upon two or more pieces of property. Amount due from each to be designated.
1189. Claim to be recorded. Fees of recorder.
1190. Time of continuance of lien.
1191. Service of summons by publication.
1192. Sub-contractors, who are and when paid out of proceeds of sale.
1193. Costs.
1194. Court to declare rank of liens.
1195. Execution for deficit.
1196. Actions for separate liens may be joined, when and

§ 1183. Every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wa[redacted]oad, aqueduct to create hydraulic power, or any other [redacted]e, or who performs labor in any mining claim, has [redacted]n the same for the work or labor done or materials furn[redacted]by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; *and every contractor, sub-contractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this chapter.* (In effect May 29, 1874.)

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1196. Actions for separate liens may be joined, when and how.
1197. Lien does not impair right to proceed for recovery of the debt.
1198. Rules of practice.
1199. New trials and appeals.

§ 1183. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, *but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay.*

Stat. 1867-68, 589, § 1, read: "Every mechanic, artisan, machinist, builder, contractor, lumber merchant, miner, laborer, or other person," instead of "every person;" also inserted "of any kind," between "materials" and "to be used;" also the words "either in whole or in part" between "repair of" and "any mining claim;" also the words "for mining or other purposes" between "hydraulic power" and "or any other;" also "or superstructure," between "structure" and "or who performs;" also substituted for the words in *italics*, the words "and every contractor, sub-contractor, architect, builder, or other person, having charge of any mining, or of the construction, alteration or repair either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

Construction of statute: 1 Cal. 183; 2 Cal. 91; 9 Cal. 122; 29 Cal. 283.

Persons entitled: 21 Cal. 80; 36 Cal. 623; 40 Cal. 185.

Amount: 27 Cal. 591; 29 Cal. 283; 31 Cal. 233.

§ 1184. Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in or otherwise improves the same, or the street in front of or adjoining the same, has a lien upon such lot for his work done and materials furnished.

Stat. 1867-68, 589, § 9, added the words "in grading, filling in, or otherwise improving the same; and all the provisions of this act respecting the securing and enforcing of mechanics' liens shall apply thereto."

Amended

§ 1185. The land upon which any building, improvement *or structure* is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, is also subject to the liens, if at the time the work was commenced or the materials for the same had commenced to be furnished, the land belonged to the person who caused said building, improvement *or structure* to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.

Stat. 1867-68, 589, § 2, added the words "and in case such interest is a leasehold interest, and the holder thereof has forfeited his right thereto, the purchaser of such building or improvement and leasehold term, or so much thereof as remains unexpired, at any sale under the provisions of this chapter, is held to be the assignee of such leasehold term, and as such is entitled to pay the lessor all arrears of rent or other money and costs due under the lease unless the lessor has regained possession of the land and property or obtained judgment for the possession thereof, prior to the commencement of the construction, alteration or repair of the building or other improvement thereon; in which event the purchaser has the right only to remove the building or other improvement within thirty days after he has purchased the same; and the owner of the land may receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal."

23 Cal. 206.

§ 1186. The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance which may have attached subsequent to the time when the building, improvement *or structure* was commenced, *work done*, or materials were commenced to be furnished; also, to any lien, mortgage or other encumbrance *of which the lien holder had no notice*, and which was unrecorded at the time the building, improvemen *or structure* was commenced, *work done*, or the materials were commenced to be furnished.

Stat. 1867–68, 589, § 3, inserted the words "upon any land or mining claim," between "chapter" and "are preferred;" also between "attached" and "subsequent;" also added the words "and all liens created by this act upon any building or other improvement, shall be preferred to all prior liens, mortgages or other incumbrances upon the land upon which said building or other improvement shall have been constructed, or situated, when altered or repaired; and in inforcing such lien, such building or other improvement may be sold separately from said land; and when so sold, the purchaser may remove the same, within a reasonable time thereafter, not to exceed thirty days, upon the payment to the owner of the land of a reasonable rent for its use from the date of his purchase to the time of removal. Provided, that if such removal be prevented by legal proceedings, the thirty days shall not begin to run until the final determination of such proceedings in the court of first resort, or in the appellate court, if appeal be taken."

7 Cal. 576; 13 Cal. 56; 18 Cal. 370; 23 Cal. 293, 522; 39 Cal. 116.

§ 1187. Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file *for record* with the county recorder of the county in which such property, or some part thereof, is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.† (In effect May 29, 1874.)

29 Cal. 283.
Filing: 1 Cal. 189.
Items: 11 Cal. 42; 16 Cal. 142; 17 Cal. 128.
Payments and offsets: 29 Cal. 283; 39 Cal. 116.
Description: 2 Cal. 63; 23 Cal. 208.

§ 1188. In every case in which one claim is filed against two or more buildings, mining claims or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims or other improvements, otherwise *the lien of* such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens by judgment, mortgage or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

Stat. 1867–68, 589, § 7, substantially the same, inserting "joint" between "such" and "claim;" also adding the words: "*Provided*, that no joint claim shall be filed upon two or more buildings, unless they are contiguous to or adjoining each other."

§ 1189. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

Stat. 1867–68, 589, § 6, same in substance.

§ 1190. No lien provided for in this chapter binds any building, mining claim, improvement *or structure*, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit.

Stat. 1867–68, 533, § 8, read "unless suit be brought" instead of "unless proceedings be commenced."

§ 1191. If service of summons be made by publication, the time of publication where the defendant resides out of or is absent from the state, or for any other cause cannot be

§ 1192. (N. S.) Every building or other improvement mentioned in § 1183 of this Code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon. (In effect May 29, 1874.)

§ 1193. (N. S.) The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where a lien shall be filed, under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable. (In effect May 29, 1874.)

than the original contractor, and sub-contractors, shall first be paid in full, or *pro rata*, i. the proceeds be insufficient to pay them in full; and out of the remainder, if any, the sub-contractors shall then be paid in full or *pro rata*, if the remainder be insufficient to pay them in full; and the remainder, if any, shall be paid to the original contractor; and each claimant shall be entitled to execution for any balance due him after such distribution, such execution to be issued by the clerk of the court upon demand, after the return of the sheriff or other officer making the sale showing such balance due.

"Third—In all suits under this act the court shall, upon entering judgment for the plaintiff, allow as a part of the costs, all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees.

"Fourth—All suits, to enforce liens created by this act, shall have preference upon the calendar of the court over any civil suit already brought or to be brought, except suits to which the state shall be a party, and shall be tried by such court without unnecessary delay.

"Fifth—In all suits to enforce any lien created by this act, all persons personally liable, and all lien-holders whose claims have been filed for record under the provisions of section five of this act, shall, and all other persons interested in the matter in controversy, or in the property sought to be charged with the lien, may be made parties; but such as are not made parties shall not be bound by such proceedings."

33 Cal. 497.

§ 1197. Nothing contained in this chapter can be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor; and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and in his affidavit to procure an attachment, need not state that his demand is not secured by a lien; but the judgment, if any, obtained by the plaintiff in such personal action, cannot be construed to impair or merge any lien held by plaintiff under this chapter.

Stat. 1867-68, 599, § 13, added the words, "*provided*, only that any money collected on said judgment shall be credited on the amount claimed under such lien in any action brought to enforce the same, in accordance with the provisions of this act."

16 Cal. 142.

§ 1198. Except as otherwise provided in this chapter, the provisions of Part II of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

Vide § 1196 and note.

§ 1199. The provisions of Part II of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

CHAPTER III.

CERTAIN LIENS FOR SALARIES AND WAGES.

SECTION 1204. Certain persons preferred creditors when assignment of property is made.
1205. Same, against estates.
1206. Same, in cases of execution or attachment.

§ 1204. In all assignments of property, made by any person to trustees or assignees, on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers, employed by such person, to the amount of one hundred dollars, and for services rendered within sixty days, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor.

Stat. 1867–68, 213, § 1, substantially the same, but inserted the words "whether real or personal, which shall hereafter be," between "property" and "made;.' also the words "or chartered company, or corporation, or by any person or persons owning or leasing real or personal property," between "person" and "to trustees;" also "forty" instead of "sixty;" also the words "gold coin of the U. S." after dollars.

§ 1205. In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant and laborer, for services rendered within the forty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims against the estate of the deceased person.

Vide § 1642.

Stat. 1867–68, 2'3, § 2, substantially the same, but inserted "gold coin of the U. S." after "dollars;" also "*pro rata*" between "paid" and "before;" also "all" before "other claims;" also added the words: "*Provided*, this act shall in no way affect the homestead or other property exempted by law from forced sale in payment of debts, or any mortgage or lien lawfully obtained on the property of the deceased before his death."

§ 1206. In cases of executions, attachments, and writs of a similar nature, issued against any person, miners, mechanics, salesmen, servants, clerks and laborers, who have claims against the defendant for labor done, may give notice of their claim, and the amount thereof, sworn to by the person making the claim, to the officer executing either of such writs, at any time before the actual sale of property levied on; and such officers must pay to such persons, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the forty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented, and claiming preference under this section, are disputed by either the debtor or creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; but in case action is rendered necessary by the act of either debtor or creditor, and judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein are likewise a preferred claim, with the same rank as the original claim.

Vide § 1613.

Stat. 1861–62, 213, § 3, substantially the same, but inserted the words "or persons, or chartered company or corporation, it shall be lawful for such" between "person" and "miner;" also omitted the words "who have claims against the defendant for labor done;" also inserted "duly certified to and" between "thereof" and "sworn to;" also "creditor or creditors making the claim" instead of "person making the claim;" also "gold coin of the U. S." after "dollars;" also added the words: "And provided, further, if the amount of the assets, after deducting costs of levy and sale, shall not be adequate to the payment of all the preferred claims of this class, they shall be paid *pro rata* out of the fund hereby made applicable thereto; and provided, further, that nothing in this act contained shall be construed to affect any homestead claims, mortgage or lien of any description, created or existing before the claim of such laborer accrued."

TITLE V.

OF CONTEMPTS.

SECTION 1209. What acts or omissions are contempts.
1210. Re-entry on property after eviction, when a contempt.
1211. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made.
1212. A warrant of attachment may issue or a notice to show cause.
1213. Bail may be given by a person arrested under such warrant.
1214. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.
1215. Bail bond, form and conditions of.
1216. Officer must return warrant and undertaking, if any.
1217. Hearing.
1218. Judgment and penalty, if guilty.
1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance.
1220. If a party fail to appear, proceedings.
1221. Illness sufficient cause for non-appearance of party arrested. Confinement under arrests for contempt.
1222. Judgment and orders in such cases final.

§ 1209. (§ 470.) The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous or insolent behaviour toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

3. Misbehaviour in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner or other person appointed or elected to perform a judicial or ministerial service.

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding.

5. Disobedience of any lawful judgment, order or process of the court.

6. Assuming to be an officer, attorney, counsel of a court, and acting as such without authority.

7. Rescuing any person or property, in the custody of an officer by virtue of an order or process of such court.

8. Unlawfully detaining a witness or party to an action while going to, remaining at or returning from the court where the action is on the calendar for trial.

9. Any other unlawful interference with the process or proceedings of a court.

10. Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness.

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience, by an inferior tribunal, magistrate or officer, of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

Stat. 1851, 126, read: "The following acts or omissions shall be deemed to be contempts:

"1st. Disorderly, contemptuous, or insolent behaviour towards the judge whilst holding court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference or arbitration, or other judicial proceeding:

"2d. A breach of the peace, boisterous conduct, or violent disturbance in presence of the court, or its immediate vicinity, tending to interrupt the due course of a trial, or other judicial proceeding:

"3d. Disobedience or resistance to any lawful writ, order, rule or process, issued by the court or judge at chambers:

"4th. Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness:

"5th. Rescuing any person or property in the custody of any officer, by virtue of an order or process of such court or judge at chambers."

SUB-DIVISION 5: 5 Cal. 494; 7 Cal. 181; 18 Cal. 60; 36 Cal. 552.

SUB-DIVISION 10: 7 Cal. 175.

§ 1210. Every person dispossessed or ejected from, or out of, any real property, by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon, or takes possession of, any such real property, or induces or procures any person not having right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt, the court or justice of the peace must immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property, under the original judgment or process, to such possession.

Stat. 1862, 115, §§ 1 and 2, substantially the same, inserting between "issued" and "upon a conviction" the words "and shall be tried and punished therefor, in the same manner and form as now provided by law, in case of contempt not committed in presence of the court or justice of the peace."

29 Cal. 672.

§ 1211. (§ 481.) When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, *or other judicial officer.*

1 Cal. 152, 187.

§ 1212. (§ 482.) When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

TITLE VI.

OF THE VOLUNTARY DISSOLUTION OF CORPORATIONS.

SECTION 1227. How dissolved.
1228. Application, what to contain.
1229. Application, how signed and verified.
1230. Filing application and publication of notice.
1231. Objections may be filed.
1232. Hearing of application.
1233. Judgment roll and appeals.

§ 1227. A corporation may be dissolved by the county judge of the county where its office or principal place of business is situated, upon its voluntary application for that purpose.

Vide § 1233 and note.

38 Cal. 166.

§ 1228. The application must be in writing, and must set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-third vote of all the stockholders or members.

2. That all claims and demands against the corporation have been satisfied and discharged.

Vide § 1233 and note.

§ 1229. The application must be signed by a majority of the board of trustees, directors or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

Vide § 1233 and note.

§ 1230. If the judge is satisfied that the application is in conformity with this title, he must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days notice of the application, by publication in some newspaper published in the county, and if there are none such, then by advertisements, posted up in three of the principal public places in the county.

Vide § 1233 and note.

§ 1231. At any time before the expiration of the time of publication any person may file his objections to the application.

Vide § 1233 and note.

§ 1232. After the time of publication has expired, the judge may, upon five days notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application; and if all the statements therein made are shown to be true, he must declare the corporation dissolved.

Vide § 1233 and note.

§ 1233. The application, notices and proof of publication, objections (if any) and declaration of dissolution, constitute the judgment roll, and from the judgment an appeal may be taken as from judgments of the county courts.

Stat. 1850, 370, § 31, read: "Any corporation wishing to dissolve and disincorporate itself shall present a petition to the county judge of the county in which the meetings of the stockholders are usually held, accompanied by a certificate signed by its proper officers and setting forth that, at a general or special meeting of the stockholders, called for that purpose it was decided by a vote of two-thirds of the stockholders, to disincorporate and dissolve the incorporation. The clerk shall enter such petition and certificate of record, and the judge shall after thirty days notice by publication in some newspaper published in the county, and if there be none such, then by advertisements posted up in the principal public places in the county, proceed to consider the same; and if the judge be of opinion that such incorporation has taken the necessary preliminary steps, and obtained the necessary vote to dissolve itself, and that all claims against the incorporation are discharged, he shall declare such incorporation dissolved."

TITLE VII.

OF EMINENT DOMAIN.

SECTION 1237. Eminent domain defined.
1238. Purposes for which it may be exercised.
1239. What estates in land may be acquired by condemnation.
1240. Private property defined. Classes enumerated.
1241. Facts necessary to be found before condemnation.
1242. Parties may make location. May enter to make surveys.
1243. Jurisdiction in district court.
1244. The complaint and its contents.
1245. Summons, what to contain. How issued and served.
1246. Who may defend. What the answer may show, and how verified.
1247. Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.
1248. Court or jury to assess damages.
1249. The date with respect to which compensation shall be assessed, and the measure thereof.
1250. New proceedings to cure defective title.
1251. Payment of damages.
1252. Damages, to whom paid.,
1253. Final order of condemnation, what to contain. When filed, title vests.
1254. Putting plaintiff in possession.
1255. Costs may be allowed, distribution thereof.
1256. Rules of practice.
1257. New trials and appeals.
1258. When title takes effect and construction of.
1259. When title takes effect.
1260. Construction.
1261. Pending proceedings not affected.
1262. Rules of practice.
1263. Exceptions.

§ 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

18 Cal. 229; 31 Cal. 538.
Statute must be strictly pursued: 19 Cal. 47; 36 Cal. 639.
As to compensation, see § 1247.

§ 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, light-houses, range and beacon lights, coast surveys, and all other public uses authorized by the government of the United States.

2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature of this state.

3. Public buildings and grounds for the use of any county, incorporated city or city and county, village, town or school district, canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city or city and county, village or town, or for draining any county, incorporated city or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys, and all other public uses for the benefit of any county, incorporated city or city and county, village or town, or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, steam and horse railroads; canals, ditches, flumes, aqueducts and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines.

6. By-roads leading from highways to residences and farms.

Vide under subdivision 1, the following statutes, to wit:
Stat. 1852, 149; stat. 1854, 41; stat. 1854, 48-9; stat. 1855, 45; stat. 1857, 74, (repealed by stat. 1859, 9.); stat. 1858, 70; stat. 1859, 26-7; stat. 1859, 334; stat. 1861, 259-60; stat. 1862, 552; stat. 1865-66, 520.
Cons. U. S., art. I, sec. 8, clause 17.

Vide under subdivision 3, the following statutes in reference to towns and villages, to wit:
Stat. 1850, 128; stat. 1855, 57-9; stat. 1856, 198-203, which repealed statutes 1850 and 1855.

The following statutes in reference to school districts, to wit:
Stat. 1863, 194-211; stat. 1863-64, 209; stat. 1865-66, 383; stat. 1867-68, 150; stat. 1869-70, 824.

The following statutes in reference to canals, to wit:
Stat. 1862, 540-41; stat. 1865-66, 53, 604-5, 786; stat. 1867-68, 134; stat. 1869-70, 660

The following statutes in reference to water companies, etc., to wit:
Stat. 1852, 171; stat. 1858, 218; stat. 1861, 228.

The following statutes in reference to roads, etc., to wit:
Stat. 1861, 389; stat. 1863, 43; stat. 186-566, 155, 381, 855; stat. 1867-68, 158; stat. 1869-70, 231.

Vide subdivision 4, the following statutes in reference to wharves, piers and chutes, to wit:
Stat. 1858, 120; stat. 1869-70, 698, 526.

The following statutes, in reference to ferries, bridges and toll roads, to wit:
Stat. 1855, 183-7; stat. 1861, 18, 307; stat. 1862, 247; stat. 1863-64, 192; stat. 1863, 720, 747-758; stat. 1867-68, 77; stat. 1869-70, 887; stat. 1850, 347; stat. 1851, 424.

The following statutes, in reference to plank and turnpike roads, to wit:
Stat. 1853, 169; stat. 1854, 74; stat. 1857, 280; stat. 1858, 265, 145.

The following statutes, in reference to steam and horse railroads, to wit:
Stat. 1861, 607-627; stat. 1863, 610, 296: stat. 1862, 547, 498; stat. 1867-68, 705; stat. 1869-70, 577, 481, 786.

The following statutes, in reference to canals, ditches, flumes, etc., to wit:
Stat. 1853, 87; stat. 1863-64, 149; stat. 1859, 93; stat. 1863, 736; stat. 1857, 121; stat. 1861, 41; stat. 1869-70, 569.

Vide note *supra* under subdivision 3.
Vide under subdivision 5, the statutes referred to under subdivision 4, *supra* in reference to canals, ditches, flumes, etc.

No reference is here made to the large number of private and local statutes which have been enacted upon most of the subjects embraced in this section.

SUB-DIVISION 1: 5 Cal. 373; 18 Cal. 229; 19 Cal. 47.

SUB-DIVISION 2: 16 Cal. 248; 27 Cal. 171.

SUB-DIVISION 3: 27 Cal. 613; 28 Cal. 345; 29 Cal. 75; 32 Cal. 241.

SUB-DIVISION 6: 32 Cal. 241.

§ 1239. The following is a classification of the interests, estates and rights in lands, subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings for use in connection with a right of way, or for an outlet for the flow, or a place for the deposit of tailings from a mine.

2. An easement, when taken for any other use.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

§ 1240. The private property which may be taken under this title, includes:

1. All real property belonging to any person.

2. Lands belonging to this state, or to any county, incorporated city or city and county, village or town, not appropriated to some publice use.

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

23 Cal. 323; 36 Cal. 639.

§ 1241. Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

16 Cal. 229; 23 Cal. 323.

§ 1242. In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examination, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness or malice.

§ 1243. All proceedings under this title must be brought in the district court for the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

23 Cal. 323; 27 Cal. 171; 28 Cal. 662; 35 Cal. 624; 36 Cal. 639.

§ 1244. The complaint must contain:

1. The name of the corporation, association, commission or person, in charge of the public use for which the property is sought, who must be styled plaintiffs.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way be sought, the complaint must show the location, general route and termini, and must be accompanied with surveys and maps thereof.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract.

All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them, to suit the convenience of parties.

24 Cal. 427; 2 Cal. 171.

§ 1245. The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is

sought and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

§ 1246. All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

7 Cal. 577; 22 Cal. 434; 29 Cal. 112; 31 Cal. 215; 36 Cal. 639.

§ 1247. The court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty.

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.

3. To determine the respective rights of different parties seeking condemnation of the same property.

6 Cal. 74; 16 Cal. 248; 22 Cal. 434; 24 Cal. 427; 29 Cal. 112; 31 Cal. 367; 35 Cal. 247.

Compensation generally: 3 Cal. 69; 4 Cal. 114; 5 Cal. 373; 6 Cal. 74; 7 Cal. 121, 577; 9 Cal. 595; 12 Cal. 500; 13 Cal. 306; 14 Cal. 106; 16 Cal. 153, 248; 18 Cal. 229; 19 Cal. 47, 579; 22 Cal. 251, 434; 23 Cal. 323; 24 Cal. 427; 27 Cal. 171, 613, 643; 28 Cal. 345, 662; 29 Cal. 75, 112, 123; 31 Cal. 215, 406, 538; 32 Cal. 241, 499; 36 Cal. 639.

§ 1248. The court, jury or referee, must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages, so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value.

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad.

5. As far as practicable, compensation must be assessed for each source of damage separately.

§ 1249. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section twelve hundred and forty-eight. If an order be made letting the plaintiff into possession, as provided in section twelve hundred and fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or damages.

§ 1250. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.
18 Cal. 29; 21 Cal. 427; 29 Cal. 112.

1251. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed; but may at the time of or before payment, elect to build the fences and cattle guards, and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such fences and cattle guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such fences and cattle guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

1252. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases, and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

§ 1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

§ 1254. At any time after service of summons, the court may authorize the plaintiff, if already in possession, to continue therein; and if not, then to take possession of and use the property during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings

against the plaintiff on account thereof; but the plaintiff must give security, to be approved by such court or judge, to pay, as well the compensation in that behalf when ascertained, as all damages which may be sustained by the defendant, if for any cause the property shall not be finally taken for public use.

§ 1255. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

§ 1256. Except as otherwise provided in this title, the provisions of Part II of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

§ 1257. The provisions of Part II of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title.

§ 1258. With relation to the acts passed at the present session of the legislature, this title must be construed in the same manner as if this code had been passed on the last day of this session, and from and after the time this code takes effect, all laws of this state in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the powers of eminent domain must conform to the provisions of this title.

§ 1259. Title VII of Part III of the code of civil procedure of the State of California (this title) shall be in force and effect from and after the fourth day of April, one thousand eight hundred and seventy-two.

§ 1260. From and after the time this title takes effect, it must be construed in the same manner as it would be were sections four and seventeen of this code in force and effect.

§ 1261. No proceeding to enforce the right of eminent domain commenced before this title takes effect, is affected by the provisions of this title.

§ 1262. Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of sections 1256 and 1257 of this title are suspended, and until then, except as otherwise provided in this title, the rules of pleading and practice in civil actions now in force in this state are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein.

§ 1263. Nothing in this code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

TITLE VIII.

OF ESCHEATED ESTATES.

SECTION 1269. Manner of commencing proceedings relative to escheated estates.
1270. Receiver of rents and profits may be appointed.
1271. Appearance, pleadings and trial.
1272. Proceedings by persons claiming escheated estates.

§ 1269. When the attorney-general is informed that any real estate has escheated to this state, he must file an information in behalf of the state, in the district court of the judicial district in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last seized, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of California has right by law to such estate. Upon such information, a summons must issue to such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order, setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from the date of the order, why the same should not vest in this state; which order must be published at least one month from the date thereof, in a newspaper published in the district, if one be published therein, and in case no newspaper is published in the district, in some other newspaper in this state.

Stat. 1853, 221-2, § 2, inserted the words "or have reason to believe" between "informed" and "that any real estate;" also between "state" and "he must file," the words "by reason that any person hath died seized thereof, and hath left no heirs capable of inheriting the same, or by reason of the incapacity of the devisees to hold the same, or when he shall be informed or have reason to believe that any such estate hath otherwise escheated to the state;" also "*terre-tenant*" instead of "occupant;" also the words "or persons, bodies politic or corporate alleged in

such information to hold, possess, or claim such estate" between "person" and "requiring:" also the words "and show cause why such estate should not be vested in the state," instead of "and answer the information:" also "thirty" instead of "forty;" also "by direction of the judge" between "district" and "in some other newspaper."

Stat. 1852, 103, § 2, was same as stat. 1855, inserting therein the words "or district attorney" after "attorney-general:" also the words "in his district" between "real estate" "and hath escheated:" also "without devising the same" between "thereof" and "and hath left;" also between "hold the same" and "or when he," the words "and such estate shall not have been sold, according to law, within two years after the death of the person last seized;" also "within his district" between "estate" and "hath otherwise:" also "or of any adjoining judicial district" after "judicial district:" also omitting the words "or any part thereof:" also inserting the words "on the first day of the next regular term of said court: which summons shall be served at least fifteen days before the return day thereof" instead of "within the time allowed by law in other civil cases."

2 Cal. 558; 5 Cal. 573; 18 Cal. 217.

§ **1270.** The court, upon the information being filed and upon the application of the attorney-general, either before or after answer, upon notice to the party claiming such estate, if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

Stat. 1855, 222, § 4.

§ **1271.** All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, the title of the state to lands and tenements therein mentioned, at any time before the time for answering expires; and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose, in open court, within the time allowed for answering; and if no person appears and answers within the time then judgment must be rendered that the state be seized of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the state, or traverse any material fact set forth in the information, the issue of fact must be tried as issues of fact are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted, that the state has good title to the land and tenements in the information mentioned, or any part thereof, judgment must be rendered that the state be seized thereof, and recover costs of suit against the defendants.

Stat. 1852, 103, § 3, inserted the words "bodies politic and corporate" between "All persons" and "named;" also the words "as *terre-tenant* or claimant to the estate" between "information" and "may appear;" also "plead to such proceedings" instead of the word "answer;" also "on or before the third day of the return day of the summons" instead of "before the time for answering expires;" also "and plead as aforesaid" between "defendant" and "and by motion;" also "pleading as aforesaid" instead of "answering;" also "and if any person shall appear and plead as aforesaid or shall refuse to plead within the time" instead of "and if no person appears and answers within the time;" also "and a survey may be ordered and entered as in other actions when the title or boundary is drawn in question" between "civil actions" and "If, after."

§ 1272. Within twenty years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the district court of the county of Sacramento, showing his claim or right to the property or the proceeds thereof. A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited, are forever barred, saving, however, to infants, married women and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within five years after their respective disabilities cease.

Stat. 1869-70, 72, § 1, amending stat. 1852, read: "The controller of the state shall keep just and true accounts of all moneys paid into the treasury, all land vested in the state, as aforesaid; and if any person shall appear within twenty years after the death of the intestate, and claim any moneys paid into the treasury, as aforesaid, as heir or legal representative, such person may file a petition to the district court, in which the seat of government may be staying, stating the nature of his claim, and praying such money may be paid him; a copy of such petition shall be served on the attorney-general at least twenty days before the hearing of said petition, who shall put in answer to the same, and the court thereupon shall examine said claim, and the allegations and proofs; and if the court shall find that such person is entitled to any money paid into the state treasury, he shall by an order direct the controller to issue his warrant on the treasury for the payment of the same, but without in-

terest or cost to the state: a copy of which order, under seal of the court, shall be a sufficient voucher for issuing such warrant; and if any person shall appear and claim land vested in the state, as aforesaid, within five years after the judgment was rendered, it shall be lawful for such person (other than such as was served with a summons or appeared to the proceedings, their heirs or assigns) to file in the said district court, in which the lands claimed lie, a petition setting forth the nature of his claim, and praying that the said lands may be relinquished to him; a copy of which petition shall be served on the attorney-general, who shall put in an answer, and the court thereupon shall examine said claim, allegations and proofs; and if it shall appear that such person is entitled to such land claimed, the court shall decree accordingly, which shall be effectual for divesting the interest of the state in or to the lands: but no costs shall be charged to the state; and all persons who shall fail to appear and file their petitions within the time limited as aforesaid, shall be forever barred, saving, however, infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions as aforesaid, at any time within five years after their respective disabilities are removed: *provided*, however, that the legislature may cause such lands to be sold at any time after seizure, in such manner as may be provided by law—in which case the claimant shall be entitled to the proceeds, in lieu of such lands, upon obtaining a decree or order as aforesaid.

TITLE IX.

OF CHANGE OF NAMES.

SECTION 1275. Jurisdiction.
1276. Application for change of name, how made.
1277. Publication of petition for.
1278. Hearing of application and remonstrance.

§ 1275. Applications for change of names must be heard and determined by the county courts.

Stat. 1855-66, 103, § 1, same in substance.

§ 1276. All applications for change of names must be made to the county court of the county where the person whose name is proposed to be changed *resides*, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years, if a female, by one of the parents, if living; or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed and the reason for such change of name, and must, if the father of such person be not living, name, as far as known to the petititioner, the near relatives of such person and their place of residence.

Stat. 1865-66, 103, § 2, read "is domiciled" instead of "resides;" also inserted the words "if of the age of fourteen years and upwards," between "such person" and "and if such person."

§ 1277. A copy of such petition must be published for four successive weeks, in some newspaper printed in the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such petition must be posted at three of the most public places in the county for a like period, and proofs must be made of such publication before the petition can be considered.

Stat. 1865-66, 103, § 3.

§ 1278. Such application must be heard at such time during term as the court may appoint, and objections may be filed by any person who can in such objections show to the court good reason against such change of name. On the hearing the court may examine, upon oath, any of the petitioners, remonstrants or other persons, touching the application, and may make an order changing the name or dismissing the application, as to the court may seem right and proper.

Stat. 1865-66, 103, § 4, read "and remonstrances may be filed by any near relatives of the person whose name is proposed to be changed, when the person is under twenty-one years of age, if a male, or eighteen, if a female, and in such and all other cases by any other person or persons who can in such remonstrance show to the court good and substantial reasons, satisfactory to the court, against such change of name," instead of "and objections may be filed by any person who can in such objections show to the court good reason against such change of name;" also inserted the words "when by the court deemed necessary" between "persons" and "touching."

Stat. 1865-66, 103, §§ 5 and 6, contained provisions for fees and costs, and for filing a certified copy of the order changing the name with the secretary of state.

§ 1279. (N. S.) Each county clerk shall, annually, in the month of January, make a return to the office of the secretary of state of all changes of names made in the county court of his county under this title; such return shall show the date of the decree of the court, original name, name decreed, and residence. Such returns shall be published in a tabular form with the statutes first published thereafter. (In effect May 12, 1874.)

TITLE X.

OF ARBITRATIONS.

SECTION 1281. What may be submitted to arbitration, and when.
1282. Submission to arbitration to be in writing.
1283. Submission may be entered as an order of the court. Revocation.
1284. Powers of arbitrators.
1285. Majority of arbitrators may determine any question. They must be sworn.
1286. Award to be in writing. When judgment to be entered.
1287. Award may be vacated in certain cases.
1288. Court may, on motion, modify or correct the award.
1289. Decision, on motion, subject to appeal, but not the judgment entered before motion.
1290. If submission be revoked and an action brought, what to be recovered.

§ 1281. (§ 380.) Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

2 Cal. 74; 3 Cal. 431; 4 Cal. 1, 205; 21 Cal. 317; 23 Cal. 275; 30 Cal. 218; 37 Cal. 197.

§ 1282. (§ 381.) The submission to arbitration must be in writing, and may be to one or more persons.

4 Cal. 1; 9 Cal. 142; 14 Cal. 390.

§ 1283. (§ 382.) It may be stipulated in the submission, that it be entered as an order of the county court, or of the district court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of

the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made.

2 Cal. 74; 4 Cal. 122; 14 Cal. 360; 30 Cal. 218; 31 Cal. 128.

§ 1284. (§ 383.) Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties and to make an award thereon.

23 Cal. 365; 30 Cal. 218.

§ 1285. (§ 384.) All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

§ 1286. (§ 385.) The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

2 Cal. 74; 14 Cal. 390; 31 Cal. 128; 37 Cal. 197.

§ 1287. (§ 386.) The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud.

2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.

3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

3 Cal. 431; 7 Cal. 312; 12 Cal. 331; 21 Cal. 317; 31 Cal. 128.

§ 1288. (§ 387.) The court may, on motion, modify or correct the award, where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein.

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted.

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

§ 1289. (§ 388.) The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made cannot be subject to appeal.

§ 1290. (§ 389.) If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

TITLE XI.

OF PROCEEDINGS IN PROBATE COURT.

CHAPTER I. OF JURISDICTION.
II. OF THE PROBATE OF WILLS.
III. OF EXECUTORS AND ADMINISTRATORS, THEIR LETTERS, BONDS, REMOVALS AND SUSPENSIONS.
IV. OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.
V. OF THE PROVISIONS FOR SUPPORT OF FAMILY, AND OF THE HOMESTEAD.
VI. OF CLAIMS AGAINST THE ESTATE.
VII. OF SALES AND CONVEYANCE OF PROPERTY TO DECEDENTS.
VIII. OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.
IX. OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.
X. OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.
XI. OF THE PARTITION, DISTRIBUTION AND FINAL SETTLEMENT OF ESTATES.
XII. OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS AND APPEALS.
XIII. OF PUBLIC ADMINISTRATOR.
XIV. OF GUARDIAN AND WARD.

CHAPTER I.

OF JURISDICTION.

SECTION 1294. Jurisdiction of Probate Court over the estate, when exercised.
1295. When jurisdiction decided by first application.

§ 1294. (§ 2.) Wills must be proved, and letters testamentary or of administration granted—

1. In the county of which the decedent was a resident at *the time of* his death, in whatever place he may have died.

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state.

3. In the county in which any part of the estate may be, the decedent having died out of the state and not a resident thereof at the time of his death.

4. In the county in which any part of the estate may be, the decedent not being a resident of the state and not leaving estate in the county in which he died.

5. In all other cases, in the county where application for letters shall first be made.

Stat. 1861, 628, inserted, in subdivision 1, the words, "or immediately previous to" between "at" and "the time of."

Stat. 1851, 448, omitted subdivisions 4 and 5.

4 Cal. 362; 5 Cal. 58, 230, 432; 6 Cal. 621, 666; 7 Cal. 215; 10 Cal. 110, 495; 12 Cal. 433; 15 Cal. 220; 17 Cal. 233; 23 Cal. 427; 24 Cal. 187.

§ 1295. (§ 3.) When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such non-resident and dying within the state and not leaving estate in the county where he died, the probate court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate.

Stat. 1851, 448, omitted the words, "or being such non-resident and dying within the state, and not leaving estate in the county where he died."

Stat. 1861, 628, omitted the words, "or of administration."

Stat. 1863–4, 367, same as § 1295. 39 Cal. 554.

CHAPTER II.

OF THE PROBATE OF WILLS.

ARTICLE I. PETITION, NOTICE AND PROOF.
II. CONTESTING PROBATE OF WILL.
III. PROBATE OF FOREIGN WILLS.
IV. CONTESTING WILL AFTER PROBATE.
V. PROBATE OF LOST OR DESTROYED WILL.
VI. PROBATE OF NUNCUPATIVE WILLS.

ARTICLE I.

PETITION, NOTICE AND PROOF.

SECTION 1298. Custodian of will to deliver same, to whom. Penalty.
1299. Who may petition for probate of will.
1300. Contents of petition.
1301. When executor forfeits right to letters.
1302. Will to accompany petition, or its presentation prayed for and how enforced.
1303. Notice of petition for probate, how given.
1304. Heirs and named executors to be notified, how.
1305. Petition may be presented to judge at chambers, and what judge may do.
1306. Hearing proof of will after proof of service of notice.
1307. Who may appear and contest the will.
1308. Probate, when no contest.
1309. Olographic wills.

§ 1298. (§ 4.) Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the probate court having jurisdiction of the estate, or to the executor named therein. *A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.*

Stat. 1851, 449, same in substance, omitting italicized words.
22 Cal. 397.

§ 1299. (§§ 5, 9.) Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.

Stat. 1851, 449, read: § 5. "Any person named as executor in any will, shall, within thirty days after the death of the testator, or within thirty days after he has knowledge that he is named executor, present the will, if in his possession, to the probate court which has jurisdiction."

§ 9. "Any person having an interest in the will may in like manner present a petition praying that it may be required to be produced, and admitted to probate."

Stat. 1851, 449, § 7, contained substance of italicized words.

22 Cal. 66, 397.

§ 1300. (§ 6.) A petition for the probate of a will must show—

1. The jurisdictional facts.

2. Whether the person named as executor consents to act, or renounces his right to letters testamentary.

3. The names, ages and residence of the heirs and devisees of the decedent.

4. The probable value and character of the property of the estate.

5. The name of the person for whom letters testamentary are prayed.

No defect of form or in the statement of jurisdictional facts actually existing shall make void the probate of a will.

Stat. 1861, 629, read: "If he intends to decline the trust, he shall, at the same time, file his renunciation in writing. If he shall neglect for ten days to file his renunciation, such neglect shall be equivalent to a renunciation, unless for cause shown, the probate court, or judge, shall extend the time; if he intends to accept, he shall present with the will a petition, setting forth the facts necessary to give jurisdiction, and when the same is known to the petitioner, the names, ages and residence of the heirs and devisees of the deceased, and the probable value and character of the property of the estate, and praying that the will be admitted to probate, and that letters testamentary be issued to him. If the jurisdictional facts existed, but are not fully set forth in the petition, and the same shall be afterwards proved in the course of the administration, the probate of the will and the subsequent proceedings shall not, on account of such want of jurisdictional averments, be held void."

Stat. 1851, 449, read: "If he intends to decline the trust, he shall at the same time file his renunciation in writing; if he intends to accept, he shall present with the will a petition praying that the will be admitted to probate, and that letters testamentary be issued to him."

19 Cal. 188; 22 Cal. 66, 397.

§ 1301. (§ 5.) If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator unless good cause for delay is shown.

Vide § 1299, *supra*, note, for § 5, stat. 1851. 22 Cal. 397.

§ 1302. (§§ 10, 11.) If it is alleged in any petition that any will is in the possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may by warrant from the court be committed to the jail of the county, and be kept in close confinement until he produces it.

§ 1303. (§ 13.) When the petition is filed and the will produced, the probate judge must fix a day for hearing the petition, not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by the clerk of the court, by publishing the same in a newspaper of the county; if there be none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication, and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing.

Stat. 1865–6, 765, read: "§ 13. When any will shall have come into the possession of the probate court, and a petition for the probate thereof and for the issuance of letters testamentary or letters of administration, with the will annexed, shall have been filed, the court or judge shall appoint a time for proving it, which shall not be less than ten nor more than thirty days, and shall cause notice to be given thereof by the clerk by publication in some newspaper, if there is one printed in the county, if not, by notices posted in three public places in the county," &c., to the end.

Stat. 1861, 629, contained only the part of stat. 1865–6, given above.

Stat. 1851, 449, read: "§ 13. When any will shall have come into the possession of the probate court, the court shall appoint a time for proving it, which shall not be less than ten nor more than thirty days, and shall cause notice to be given thereof by publication, not less than twice a week, in some newspaper, if there is one printed in the county, or if not, by notices in writing, posted in three public places in the county."

§ 16 of stat. 1851, 450, read: "The court shall also direct subpœnas to be issued to the subscribing witnesses to the will, if they reside in the county."

Stat. 1861, 629, read: "shall" for "may."

19 Cal. 162; 22 Cal. 16, 337; 36 Cal. 438; 39 Cal. 554.

§ 1304. (§§ 14, 15.) *The heirs of the testator, resident in the county or state, must have written or printed copies of the notice of the time fixed for the probate of the will, addressed to them at their places of residence postage paid, and placed in the post office by the petitioner, at the date of the first publication; the notice must be issued by the clerk, under his official seal. Proof of mailing the notice must be made at the hearing; the same notice and proof of service thereof on the person named as executor must be made, if he be not the petitioner; also, on any person named as co-executor, not petitioning.*

Stat. 1851, 450, read: "§ 14. If the heirs of the testator reside in the county, the court shall also direct citations to be issued and served upon them to appear and contest the probate of the will at the time appointed."

"§ 15. If the will is presented by any other person than the one named as executor, or if it is presented by one of several persons named as executors in the will, citations shall also be issued and served upon such person or persons, if resident within the county."

14 Cal. 103.

§ 1305. (§ 12.) The probate judge may, out of term time or at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills *and the attendance of witnesses*, and may appoint special terms of his court for hearing the petitions, trials of issues, and admitting wills to probate.

Stat. 1861, 629, was the same in substance, substituting the words, "of any such application," for the words following "hearing" in the last two lines.

Stat. 1851, 449, omitted all after "witnesses."

§ 1306. (§ 17.) At the time appointed for, or to which the hearing may have been postponed, the court must require proof, by affidavit, that the notices herein before required have been personally served or mailed and published, which being made, the court must hear testimony in proof of the will. If such

notice is not proved to have been given, or if from any other cause it is necessary, the hearing may be postponed to a day certain, and notice to absentees given thereof, as original notice is required to be given. The appearance in court of parties interested is a waiver of notice.

Stat. 1861, 629, read: "At the time appointed, or at any time to which the hearing may be continued, upon proof being made *by affidavit or otherwise, to the satisfaction of the court*, that notice has been given as required in the preceding sections, the court shall proceed to hear the testimony in proof of the will."
Stat. 1851, 450, omitted from stat. 1861, the italicized words.

§ 1307. (§ 18.) Any person interested may appear and contest the will. *Devisees, legatees, heirs or creditors of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate, by the party so represented, if commenced within the time provided in article four of this chapter; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will.*

Stat. 1861, 630, substituted for the italicised words, the following: "If it appears that there are minors, or persons residing out of the county, who are interested in the estate, the court shall appoint some attorney to represent them."
Stat. 1851, 450, was same as stat. 1861, omitting the words, "in the estate."
5 Cal. 432; 6 Cal. 158; 20 Cal. 264; 34 Cal. 687; 35 Cal. 510; 36 Cal. 506.

§ 1308. (§ 19.) If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

§ 1309. An olographic will may be proved in the same manner that other private writings are proved.

ARTICLE II.

CONTESTING PROBATE OF WILLS.

SECTION 1312. Contestant to file grounds of contest, and petitioner to reply.
1313. How jury obtained and trial had.
1314. Verdict of the jury. Judgment. Appeal.
1315. Witnesses, who and how many to be examined. Proof of handwriting admitted, when.
1316. Testimony reduced to writing for future evidence.
1317. If proved, certificate to be attached.
1318. Will and proof to be filed and recorded.

§ 1312. (§ 20.) If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three of this code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving—

1. The competency of the decedent to make a last will and testament.

2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence.

3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,

4. Any other questions substantially affecting the validity of the will—

Must, on request of either party in writing, (filed three days prior to the day set for the hearing) be tried by a jury. If no jury is demanded, the court must try and determine the issues

joined. On the trial, the contestant is plaintiff and the petitioner is defendant.

Stat. 1867–8, 628, read: "If any person appear and contest the will, he shall file a statement, in writing, of the grounds of his [or her] opposition. When any issue or issues of fact shall be joined in the probate courts, respecting the competency of the deceased to make a last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representation, or for any other cause affecting the validity of such will, such issue or issues shall, at the request in writing of either of the parties interested, [be tried by a jury, to be impanneled by the probate court, as hereinafter provided; and if a jury trial be not demanded, as in this section provided, the said issues shall be tried and determined by the probate court. When a jury trial shall be demanded, a request in writing therefor shall be filed with the clerk of the probate court at least three days before the day set for the trial of the issues in the probate court. Issue shall be deemed joined by the filing of the grounds of opposition, as afore. said, with the clerk of the probate court. Such issue or issues of fact shall be made up and tried in the same manner as is or may be provided by law for the trial of issues of fact in other cases; and upon determination of such issue or issues of fact, the jury trying the same shall render a special verdict thereon. And whenever a trial by jury of any issue of fact joined in the probate court in the manner provided in this act, shall be demanded in writing, as in this section provided, it shall be the duty of the probate court to cause to be summoned and impanneled a jury for the trial of such issue or issues of fact. Such jury shall be summoned and impanneled by the probate court in the same manner as is provided for by law for summoning and impanneling trial juries in the county courts of this state for the trial of civil actions, for the trial of such issues or issue of fact, and at such time as the court shall direct. The trial shall be had as in other civil cases; and upon determining such issue or issues of fact, the jury trying the same shall render a special verdict upon each of the issues submitted to them; and the probate court shall proceed to admit said will to probate, or not, according to the facts found and the law; and a new trial may be had, and also appeal taken from such trial, verdict and judgment, as in other civil cases; and the act regulating proceedings in civil cases in the courts of justice in this state, when not inconsistent with or repugnant to the provisions of this act, shall be applicable to and govern the practice on trials of issue of fact by jury in the probate court, provided for in this act.]"

Stat. 1861, 630, was the same as stat. 1867, substituting for the words in brackets, the following: "certified immediately to the district court of the proper county, for trial by jury, otherwise the same shall be tried by the probate court. Such request in writing shall be filed at least three days before any day set for the trial of the issue in the probate court. Issue shall be deemed joined by the filing of the grounds of opposition as aforesaid, with the clerk of the probate court. Such issue, or issues, of fact, shall be made up and tried in the same manner as is, or may be, provided by law for the trial of issues of fact in other cases. Upon determination of such issue, or issues, of fact, the jury trying the same shall render a special verdict thereon, and the finding of the jury shall be certified by the district court to the probate court, whereupon the probate court shall proceed to admit said will to probate, or not, according to the facts found and the law."

Stat. 1855, 132, was same as stat. 1861, omitting the words, "in writing" after "request"; also substituting, "or may, by consent of the parties," for the words, "otherwise the same shall."

Stat. 1851, 450, read: "If any person appears and contests a will, he shall file a statement of the grounds of his opposition."

§ 1313. (§ 20.) When a jury is demanded, the probate

court must summons and impannel a jury to try the case, in the manner provided for summoning and impanneling trial juries in courts of record, and the trial must be conducted in accordance with the provisions of part two, title eight, chapter four of this code. A trial by the court must be conducted as provided in part two, title eight, chapter five of this code.

Vide § 1312 and note. 34 Cal. 687; 35 Cal. 510

§ 1314. (§ 20.) The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will and proofs must be recorded.

Vide § 1312 and note. Also § 1313.

§ 23, Stat. 1851, 459, read: "The testimony of each witness shall be reduced to writing, and signed by him, and shall be deemed good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this State."

5 Cal. 432; 10 Cal. 500; 22 Cal. 70.

§ 1315. (§§ 21, 22.) If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

10 Cal. 478.

§ 1316. (§ 23.) The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state.

Vide note to § 1314.

§ 1317. (§ 24.) If the court is satisfied, upon the proof taken or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not *acting* under *duress, menace, fraud or undue influence*, a certificate of the proof and the facts found, signed by the probate judge and attested by the seal of the court, must be attached to the will.

Stat. 1855, 132, substituted the words, "restraint, undue influence or fraudulent misrepresentation," for italicized words.
Stat. 1851, 450, omitted from stat. 1855, the words: "or from the facts found by the jury."
22 Cal. 69.

§ 1318. (§ 25.) The will and a certificate of the proof thereof, together with all the testimony taken, must be filed by the clerk, and recorded by him in a book to be provided for the purpose.
22 Cal. 69.

ARTICLE III.

PROBATE OF FOREIGN WILLS.

SECTION 1322. Wills proved in other states to be recorded, when and where.
1323. Proceedings on the production of a foreign will.
1324. Hearing proofs of probate of foreign will.

§ 1322. (§ 27.) Every will duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the probate court of any county in which the testator shall have left any estate.

Stat. 1863, 37, was the same as stat. 1851, substituting the words, "in any State, Territory or District," for "in any other."
Stat. 1851, 451, was the same as § 1322, adding the words, "provided, it has been executed in conformity with the laws of this State."

§ 1323. (§ 28.) When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.

Stat. 1863–4, 367, substituted the words, "to whom letters of Administration, with the will annexed, might be granted," for "interested in the will."
Stat. 1851, 451, is substantially the same as § 1323, omitting the words, "with a petition for letters, the same must be filed," which were added by stat. 1861, 630.
39 Cal. 554.

§ 1324. (§ 29.) If on the hearing, it appears upon the face of the record that the will has been proved, allowed and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon.

Stat. 1863–4, 368: "§ 29. If, on the hearing, it shall appear to the Court that the instrument ought to be allowed as the will of the deceased, the authenticated copy shall be admitted to probate and recorded the same as in case of other wills, and the will shall have the

same force and effect as if it had been originally proved and allowed in the same Court. [It shall be sufficient if it shall appear from the copies referred to in the preceding section that the will was executed in conformity with the laws of this State, and was proved and allowed in conformity with the laws of the State, Territory, district, foreign country or State where the same was proved and allowed, and that the same was proved and allowed in conformity with the laws last referred to; the copy of the order, decree, judgment, or certificate of the Court or officer having jurisdiction of the subject-matter, duly authenticated, showing that the will has been proved and allowed, shall be prima facie evidence, and also prima facie evidence of the death of the testator; but nothing herein shall be so construed as to exclude any other legal evidence.]"

Stat. 1861, 630, same as 1863-4, omitting therefrom the words in brackets.

Stat. 1851, 451, read: "§ 29. If on the hearing it shall appear to the Court that the instrument ought to be allowed as the will of the deceased, a copy shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same Court."

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

SECTION 1327. The probate may be contested within one year.
1328. Citation to be issued to parties interested.
1329. The hearing had on proof of service.
1330. Petitions to revoke probate of will tried by jury or court. Judgment, what.
1331. On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith.
1332. Costs and expenses, by whom paid.
1333. Probate, when conclusive. One year after removal of disability given to infants and others.

§ 1327. (§ 30.) When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

20 Cal. 272.

§ 1328. (§ 31.) Upon the filing of the petition a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees mentioned in the will, residing in the state; or to their guardians, if any of them are minors; or their personal representatives, if any of them are dead; requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked.

14 Cal. 103.

§ 1329. (§ 32.) At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court must *proceed to try the issues of fact joined in the same manner as in an original contest of a will.*

Stat. 1851, 451, substituted for the italicized words the words, "proceed to hear the proofs of the parties. If any devisees or legatees named in the will shall be minors, and have no guardians, the court shall appoint some attorney to represent them."

§ 1330. (§ 33.) In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked.

Stat. 1851, 451, read: "§ 33. If upon the hearing of the proofs of the parties, the Court shall decide that the will is for any reason invalid, or that it is not sufficiently proved to have been the last will of the testator, the probate shall be amended and revoked."

§ 1331. (§ 34.) Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

§ 1332. (§ 35.) The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

Stat. 1851, 452, provided that in case of revocation the expenses be paid out of the property of deceased.
Stat. 1861, 630, was the same in substance as § 1332. 19 Cal. 390.

§ 1333. (§ 36.) If no person, within one year after the probate of a will, contests the same or the validity thereof, the probate of the will is conclusive; saving to infants, married women and persons of unsound mind, a like period of one year after their respective disabilities are removed.

20 Cal. 272.

ARTICLE V

PROBATE OF LOST OR DESTROYED WILL.

SECTION 1338. Proof of lost or destroyed will to be taken.
1339. Must have been in existence at time of death.
1340. To be certified, recorded and letters thereon granted.
1341. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.

§ 1338. (§ 37.) Whenever any will is lost or destroyed, the probate court must take proof of the execution and validity thereof and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing and signed by the witnesses.

§ 1339. (§ 38.) No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

§ 1340. (§ 39.) When a lost will is established, the provisions thereof must be distinctly stated and certified by the probate judge, under his hand and the seal of his court, and the certificate, together with the testimony upon which it is founded, must be *filed and* recorded as other wills are *filed and* recorded, and letters testamentary or of administration with the will annexed must be issued thereon, in the same manner as upon wills produced and duly proved.

§ 1341. (§ 40.) If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

ARTICLE VI.

THE PROBATE OF NUNCUPATIVE WILLS.

SECTION 1344. Nuncupative wills, when and how admitted to probate.
1345. Additional requirements in probate of nuncupative wills.
1346. Contests and appointments to conform to provisions as to other wills.

§ 1344. Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in article one, chapter two, of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

Vide note to § 1346. 1 Cal. 488.

§ 1345. The probate court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of fourteen days from the death of the testator, nor must such petition at any time be acted on unless the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife, (if any) and all other persons resident in the state or county, interested in the estate are notified as hereinbefore provided.

Vide note to § 1346.

§ 1346. Contests of the probate of nuncupative wills and appointments of executors and administrators of the estate devised thereby, must be had, conducted and made as hereinbefore provided in cases of the probate of written wills.

Stat. 1850, 177, §§ 7, 8, 9, read: "§ 7. No nuncupative will shall be good when the estate bequeathed exceeds the value of five hundred dollars, nor, unless the same be proved by two witnesses, who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid some one present to bear witness that such was his will, or to that effect, nor unless such nuncupative will was made at the time of the last sickness, and at the dwelling-house of the deceased, or where he or she had been residing for the space of ten days or more, except where such person was taken sick from home, and died before his or her return. Nothing contained herein shall prevent

any soldier being in actual service, nor mariner being on ship-board, from disposing of his wages and other personal estate by a nuncupative will."

§ 8. "No proof shall be received of any nuncupative will, unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.

§ 9. "No probate of any nuncupative will shall be granted for fourteen days after the death of the testator, nor shall any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process be issued to call in the widow, or other person or persons interested, to contest the probate of such will, if they think proper."

CHAPTER III.

OF EXECUTORS AND ADMINISTRATORS, THEIR LETTERS, BONDS, REMOVALS AND SUSPENSIONS.

ARTICLE I. LETTERS TESTAMENTARY AND OF ADMINISTRATION, WITH THE WILL ANNEXED, HOW AND TO WHOM ISSUED.
II. FORM OF LETTERS.
III. LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDER IN WHICH THEY ARE GRANTED.
IV. PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.
V. REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.
VI. OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.
VII. SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES.
VIII. WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED.
IX. DISQUALIFICATION OF JUDGES AND TRANSFERS OF ADMINISTRATION.
X. REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

ARTICLE I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION, WITH THE WILL ANNEXED, HOW AND TO WHOM ISSUED.

SECTION 1349. To whom letters on proved will to issue.
1350. Who are incompetent as executors or administrators. Letters with will annexed to issue, when.
1351. Interested parties may file objections.
1352. Unmarried woman executrix or administratrix

marrying, her authority ceases. Married women named may be executrix but not administratrix.

1353. Executor of an executor.

1354. Letters of administration *durante minore ætate*.

1355. Acts of a portion of executors valid.

1356. Authority of administrators with will annexed. Letters, how issued.

§ 1349. (§ 41.) The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, *unless objection is made as provided in section thirteen hundred and fifty-one*.

22 Cal. 66; 34 Cal. 571. *Vide* § 1369 and note.

§ 1350. (§ 42.) No person is competent to serve as executor who, at the time the will is admitted to probate, is—

1. Under the age of majority.

2. Convicted of an infamous crime.

3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity.

If the sole executor, or all the executors are, incompetent, or renounce or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued.

Stat. 1851, 453, omitted the words, "integrity"; "or shall renounce, or fail to apply for letters, or to appear and qualify," which were added by stat. 1861, 631.

23 Cal. 478; 25 Cal. 586; 32 Cal. 441; 36 Cal. 82.

§ 1351. (§ 43.) Any person interested in a will may file objections in writing, to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court; a petition may, at the same time, be filed for letters of administration with the will annexed.

Stat. 1851, 453, omitted the last clause, (a petition, etc.) which was added by stat. 1861, 631.

Vide § 1370 and note.

§ 1352. (§ 44.) When an unmarried woman, appointed executrix, marries, her authority is extinguished. When a married

woman is named as executrix, she may be appointed and serve in every respect as a feme sole.

Stat. 1851, 453, omitted the last sentence, which was added by stat. 1861, 631.

18 Cal. 20; Chapman v. Hollister, Oct. T. 1871.

§ 1353. (§ 45.) No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

§ 1354. (§ 46.) Where a person absent from the state, or a minor is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor who may then be admitted as joint executor. If there is no other executor, letters of administration, with the will annexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.

Stat. 1851, 453, read: "When a person under the age of twenty-one years shall be named executor, letters of administration, with the will annexed, shall be granted during the minority of the executor, who shall accept the trust and qualify, in which case the executor, who shall accept the trust and qualify, shall have letters testamentary, and shall administer the estate until the minor shall arrive at full age, when he may be admitted as joint executor."

§ 1355. (§ 47.) When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid.

Stat. 1861, 631, substituted, "under seal to act alone, or," for "in writing"; also, "sufficient" for "valid."

Stat. 1851, 453, omitted all after the words, "should act together" in fifth line.

24 Cal. 509; 29 Cal. 225.

§ 1856. (§§ 48, 49.) Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof.

29 Cal. 509; 32 Cal. 441.

ARTICLE II

FORM OF LETTERS.

SECTION 1360 Form of letters testamentary.
1361 Form of letters of administration with the will annexed.
1362. Form of letters of administration

§ 1360. (§ 50.) Letters testamentary must be substantially in the following form: State of California, county of ———. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of ———, C. D., who is named therein, is hereby appointed executor. Witness, G. H., clerk of the probate court of the county of ———, with the seal of the court affixed, the ——— day of ———, A. D., 18— (seal). By order of the court, G. H., clerk.

§ 1361. (§ 51.) Letters of administration with the will annexed must be substantially in the following form: State of California, county of ———. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of ———, and there being no executor named in the will, (or as the case may be) C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the probate court of the county of ———, with the seal of the court affixed, the ——— day of ———, A. D., 18— (seal). By order of the court, G. H., clerk.

§ 1362. (§ 71.) Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county of ———. C. D. is hereby appointed administrator of the estate of A. B., deceased.

(Seal.) Witness, G. H., clerk of the probate court of the county of ———, with the seal thereof affixed, the ——— day of ———, A. D., 18—. By order of the court, G. H., clerk.

ARTICLE III.

LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDER IN WHICH THEY ARE GRANTED.

SECTION 1865. Order of persons entitled to administer. Partner not to administer.
1866. Preference of persons equally entitled.
1867. In discretion of court to appoint administrator, when.
1868. When minor entitled, who appointed administrator.
1869. Who are incompetent to act as administrators.
1870. Married woman not to be administratrix.

§ 1865. (§ 52.) Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife, or some *competent* person whom he or she may *request to have appointed.*
2. The children.
3. The father or mother.
4. The brothers
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The creditors.
9. The public administrator.
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Stat. 1863-4, 532, inserted the words, "appoint," for "request to have appointed," in subdivision 1; also, placed the public administrator before creditors in the order.

Stat. 1861, 631, inserted between subdivisions 8 and 9, a subdivision as follows: "Any of the kindred not above enumerated within the fourth degree of consanguinity"; also, the word "kindred" for "next of kin," in subdivision 7; and read in subdivision 1, "may request to have appointed."

Stat. 1855, 132, was same as stat. 1863-4; except it read in subdivision 1, "may request to have appointed."

Stat. 1851, 454, omitted all after subdivision 10; also placed public administrator before creditors in the order.

5 Cal. 64; 7 Cal. 210; 11 Cal. 128; 16 Cal. 164, 367; 23 Cal. 478; 25 Cal. 515, 587; 34 Cal. 468; 35 Cal. 644.

§ 1366. (§ 53.) Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

§ 1367. (§ 54.) When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent.

Stat. 1863–4, 368, inserted the words, "in its discretion" between "may" and "grant," in second line.

Stat. 1851, 454, omitted last clause beginning with the words, "and when a creditor."

§ 1368. (§ 57.) If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court.

Stat. 1851, 454, omitted the last clause beginning with the words, "or any other person," which was added by stat. 1869-70, 637.

§ 1369. (§ 55.) No person is competent to serve as administrator or administratrix, who, when appointed is

1. Under the age of majority.
2. Convicted of an infamous crime.
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity.

Stat. 1861, 632, read: "No person shall be entitled to letters of administration," instead of, "No person is competent to serve as administrator or administratrix."

Stat. 1851, 454, same as 1861, omitting the word "integrity."

Vide § 1350 and note.

§ 1370. (§ 56.) A married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is extinguished.

Amendment approved February 13, 1872.—[§ 56. When any unmarried woman who shall have been appointed administratrix, shall marry, her marriage shall extinguish her authority as such

administratrix. Administration shall not be granted to a married woman.]

Stat. 1865-6, 765, substantially the same.

Stat. 1851, 454, omitted the first sentence.

Stat. 1869-70, 636, was as follows: "When any unmarried woman who shall have been appointed administrtrix shall marry, her marriage shall extinguish her authority. Administration shall not be granted to a [or] at the request of a married woman."

Vide § 1352.

ARTICLE IV.

PETITION FOR LETTERS AND ACTION THEREON.

SECTION 1371. Applications, how made.
1372. When granted.
1373. Notice of application.
1374. Contesting applications.
1375. Hearing of application.
1376. Evidence of notice.
1377. Grant to any applicant.
1378. What proofs must be made before granting letters of administration.
1379. Letters may be granted to others than those entitled.

§ 1371. (§58.) Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.

Stat. 1851, 454, omitted all after the words, "jurisdiction of the case," which was added by stat. 1861, 632.

7 Cal. 233; 17 Cal. 237; 19 Cal. 186; 23 Cal. 186; 33 Cal. 541; 34 Cal. 466; 36 Cal. 82.

§ 1372. (§ 59.) Letters of administration may be granted at a regular term of the court, or at a special term appointed by the judge for the hearing of the application.

Stat. 1851, 454, read: "shall only," instead of "may."

§ 1373. (§ 60.) When a petition, praying for letters of administration, is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant and the term of the court at which the application will be heard. Such notice must be given at least ten days before the hearing.

§ 1374. (§ 61.) Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. *In the latter case the contestant must file the petition and give the notice required for an original petition, and the court must hear the two petitions together.*

Stat. 1861, 632, substituted for the words in italics, the words, "after proper petition filed, and due notice given."
Stat. 1851, 455, omitted italicised words.

§ 1375. (§ 62.) On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

Stat. 1851, 455, read: "according to law," instead of "as herein required"; also, "as the case may require," instead of, "to the party best entitled thereto."
7 Cal. 237; 34 Cal. 468.

§ 1376. (§ 63.) An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice.

Stat. 1851, 455, inserted "had been," between "notice" and "given"; also, "according to law," between "given" and "shall."
7 Cal. 237.

§ 1377. (§ 64.) Letters of administration must be granted to any applicant, though it appears that there are other persons

having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.

16 Cal. 165.

§ 1378. (§ 65.) Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant *or others*, and the court may also examine any other person concerning the time, place and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

Stat. 1861, 632, inserted the words, "of his death," after "residence at the time."

Stat. 1851, 455, read: "oath," instead of "testimony"; also, omitted the words, "the place of his residence at the time, the value and character of his property."

7 Cal, 237.

§ 1379. (§ 66.) Administration may be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits or depositions, taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as primary evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

Stat. 1861, 633, substantially the same, reading, "*prima facie*" for "primary"; also, inserting "reasonable" before "suspicion."

Stat. 1851, 455, omitted all after the words "filed in the court"; also, inserted after "entitled," the words, "to be joined with such person."

16 Cal. 164; 25 Cal. 586; 28 Cal. 186.

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

SECTION 1383. Revocation of letters of administration.
1384. When petition filed, citation to issue.
1385. Hearing of petition for revocation.
1386. Prior rights of relatives entitles them to revoke prior letters.

§ 1383. (§ 67.) When letters of administration have been granted to any person other than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them may obtain the revocation of the letters and be entitled to the administration, by presenting to the probate court a petition praying the revocation, and that letters of administration may be issued to him.

Stat. 1869-70, 400, added the words, "or her."

Stat. 1851, 455, added the words, "or her"; but omitted the words, "or sister."

15 Cal. 220; 16 Cal. 165; 23 Cal. 478; 25 Cal. 586; Chapman v. Hollister, Oct. T., 1871.

§ 1384. (§ 68.) When such petition is filed, the clerk must issue a citation to the administrator to appear and answer the same on some day of a regular term of the court, or a special term appointed by the court or judge for the hearing thereof.

Stat. 1861, 633, inserted "that may be" between "term" and "appointed"; also read: "answer the petition," instead of, "answer the same."

Stat. 1851, 455, omitted the words, "court or" before "judge"; also read: "at the next regular term of the court," instead of, "on some day of a regular term of the court": also, "answer the petition," instead of "answer the same."

23 Cal. 478.

§ 1385. (§ 69.) At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

Stat. 1851, 455, substantially the same, inserting the words, "or she," after "and he."

23 Cal. 478.

§ 1386. (§ 70.) The surviving husband or wife, when letters of administration have been granted to a child, father, brother or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

Stat. 1869-70, inserted "or her" after "his."

Stat. 1851, 455, omitted the words, "or sister"; but inserted "or her" after "his."

ARTICLE VI.

OATHS AND BOND OF EXECUTORS AND ADMINISTRATORS, ETC.

SECTION 1387. Administrator or executor to take oath. Letters and bond to be recorded.
1388 Bond of administrators, form and requirements of.
1389. Additional bonds when required.
1390. Conditions of bonds.
1391. Each, or more than one administrator, to give separate bonds.
1392. Several recoveries may be had on same bond.
1393. Bonds, and justification of sureties on. Must be approved.
1394. Citation and requirements of judge on deficient bond. Additional security.
1395. Right ceases, when.
1396. When bond may be dispensed with.
1397. Petition showing failing sureties and asking for further bonds.
1398. Citation to executor, etc., to show cause against such application.
1399. Further security may be ordered.
1400. Neglecting to obey order.
1401 Suspending powers of executor, etc.
1402. Further security ordered without application of party in interest.
1403. Release of sureties.
1404. New sureties.
1405. Neglect to give new sureties forfeits letters.
1406. Application to be determined out of term time.

§ 1387. (§ 72.) Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose.

Stat. 1851, 456, contained the words, "or affirmation" between "oath" and "before"; also substituted "before the probate judge or clerk," for the words, "before some officer authorized to administer oaths"; and omitted all after the words, "of executor or administrator."

Stat. 1861, 633, same as §1387, inserting same words, and substituting same words as 1851; also inserting the words, "as provided for in this act," between "thereon" and "must"; also, "respectively" between "estates" and "in"; also, "a book," for "books"; and adding the words, "and the said records and duly certified copies taken therefrom, shall have the same force and effect, in all cases whatsoever, as the original papers would have."

Stat. 1862, 13, same as 1861, inserting therein the words, "or other officer authorized to administer oaths," between "clerk" and "that he will perform."

§ 1388. (§ 73.) Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the probate judge. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property and twice the probable value of the annual rents, profits and issues of the real property belonging to the estate, which values must be ascertained by the probate judge by examining on oath the party applying, and any other persons.

Stat. 1851, 456, same down to word, "value," and thereafter substituted the words, "of the estate, which value shall be ascertained by the probate judge, by the examination, on oath, of the party applying, and of any other person he may think proper to examine. The bond shall be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law."

Stat. 1852, 105, inserted in 1851, the words, "the probate judge shall require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him," between "proper to examine" and "the bond"; also, added the words, "he shall also require bond and sufficient surety for the annual rents, issues and profits, of all real estate in his charge as such executor or administrator, to be approved by the probate judge."

Stat. 1863-4, 368, was same as §1388, and also added the language used in §§ 1389, 1390 *infra*.

§ 1389. (§ 73.) The probate judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in, or that will come into, the possession of the executor or administrator, including the annual rents, profits and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

Vide § 1388 and note. 34 Cal. 468.

§ 1390. (§ 73.) The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

Vide § 1388 and note. 5 Cal. 443; 28 Cal. 187; 37 Cal. 431.

§ 1391. (§ 74.) When two or more persons are appointed executors or administrators, the probate judge must require and take a separate bond from each of them.

§ 1392. (§ 75.) The bond shall not be void upon the first recovery, but may be sued *and recovered* upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted

§ 1393. (§ 76.) In all cases where bonds or undertakings are required to be given, under this title, the sureties must justify thereon in the same manner and in like amounts as required by section ten hundred and fifty-seven of this code, and the certificate thereof must be attached to, and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by the probate judge before being filed or recorded.

Stat. 1851, 456, read: "In all cases where bonds are required by this act, the sureties must justify on oath, before the judge of some court having a seal, to the effect that they are householders or freeholders, resident within this state, and that they are worth double the amount for which they become liable, over and above their debts; such justification shall be in writing certified by the judge before whom taken, and attached to and filed with the bond. Whenever the penal sum of the bond amounts to more than five thousand dollars, sureties may be allowed to become liable for portions of said penal sum, making in the aggregate at least two sureties for the whole penal sum, or for each portion thereof."

Stat. 1855, 299, same as 1851, inserting therein the words, "or clerk" after "judge" wherever it occurs; also, substituting "amount justified to" for "double the amount for which they become liable"; inserting, also, "and liabilities exclusive of property exempt from execution," between "debts" and "such justification"; also, "signed by the person justifying and," between "writing" and "certified"; also, substituting "two" for "five."

Stat. 1861, 633, same as 1855, omitting words, "or clerk."

Stat. 1863-4, 371, same as 1861, substituting the words, "before some officer authorized to administer oaths," instead of "before the judge of some court having a seal."

§ 1394. (§ 76.) Before the probate judge approves any bond required under this title, he may of his own motion, or at any time after the approval of such bond, upon the motion of any person interested in the estate, supported by affidavit that any one or all of such sureties are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him, at a certain time and place, to testify touching their property and its value; and the judge must, at the time such citation is issued, cause a notice to be issued to the executor or administrator, requiring his appearance at the return of the citation. Upon the return of the citation, the judge may swear the sureties, and such witnesses as may be produced, touching the property of such sureties and its value; and if upon such investigation the judge is satisfied that the bond is insufficient, he may require sufficient additional security, within such time as may be reasonable, not less than five days.

Stat. 1855, 300, § 3.

§ 1395. (§ 76.) If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

Stat. 1855, 300, § 4.

§ 1396. (§ 77.) When it is expressly provided in the will of a testator that no bond is required of the executor, letters testamentary may issue and sales of real estate be made and confirmed without any bond being given; but an executor to whom letters are issued without bond may at any time afterward

(when it appears from any cause necessary or proper) be required to file a bond, as in other cases.

Stat. 1851, 456, omitted the words, "and sales of real estate be made and confirmed."

Stat. 1863–4, 369, substituted, "whenever it may be shown from any cause to be necessary or proper," for the words in the brackets.

§ 1397. (§ 78.) Any person interested in an estate may, by verified petition, represent to the probate judge that the sureties of the executor or administrator thereof have become or are becoming insolvent, or that they have removed or are about to remove from the state, or that from any other cause the bond is insufficient, and ask that further security be required.

This contains the substance of Stat. 1851, 457.

§ 1398. (§ 79.) If the probate judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his last place of residence, *or by such publication as the court or judge may order.*

§ 1399. (§ 80.) On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form, within a reasonable time, not less than five days.

§ 1400. (§ 81.) If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

§ 1401. (§ 82.) When a petition is presented, praying that an executor or administrator be required to give further security, *or to give bond, where by the terms of the will no bond was*

originally required, and it is alleged, on oath, that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

Stat. 1851, 457, inserted the words, "or affirmation," after the word, "oath."

§ 1402. (§ 83.) When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the probate judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

Stat. 1851, 457, uses the words, "it shall be the duty of, etc," instead of the words, "must, etc."

§ 1403. (§ 84.) When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the probate court or judge for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place to be therein specified, and to give other security; if he has absconded, left or removed from the state, or if he cannot be found, after due diligence and inquiry, service may be made *as provided in section thirteen hundred and ninety-eight.*

Stat. 1851, 457, omitted all after the word, "security"; also, the word, "personally."

Stat. 1861, 633, substituted for the italicized words the words, "by leaving a copy at his last place of residence, if the same can be ascertained, and by such publication as the court, or probate judge, may order."

§ 1404. (§ 85.) If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default or misconduct of the executor or administrator.

§ 1405. (§ 86.) If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application

shall consent to a longer extension of time, the court or judge must, by order, revoke his letters.

Stat. 1861, 634, inserted the words, "not exceeding five days" after the word, "allow."

Stat. 1851, 457, omitted the words, "unless the surety making application shall consent to a longer extension of time."

§ 1406. (§ 87.) The applications authorized by the nine preceding sections of this chapter may be heard and determined out of term time. All orders made therein must be entered upon the minutes of the court.

ARTICLE VII.

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES.

SECTION 1411. Special administrator, when appointed.
1412. Special letters may be issued out of term time.
1413. Preference given to persons entitled to letters.
1414. Special administrator to give bond and take oath.
1415. Duties of special administrator.
1416. When letters testamentary or of administration are granted special administrator's powers cease.
1417. Special administrator to render account.

§ 1411. (§§ 88, 95, 282.) When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, *or when an administrator or executor dies or is suspended or removed*, the probate judge must appoint a special administrator to collect and take charge of the estate of the decedent, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate.

Stat. 1855, 133, § 4, was the same, omitting the italicized words, and inserting, "by law" after "required."

Stat. 1851, 458, omitted the words, "or when such letters are granted irregularly, or no sufficient bond is filed as required"; also, the words, "in whatever county or counties the same may be found."

Stat. 1851, 458, § 95, read: Whenever an executor or administrator shall die, or his letters be revoked, and the circumstances of the estate require the immediate appointment of an administrator, the probate judge may appoint a special administrator, as provided in the preceding sections."

Stat. 1851, 485, § 282, read: "During the suspension of the powers of the executor or administrator, under the authority of the preceding section, the probate judge may, if the condition of the estate requires it, appoint a special administrator to take charge of the effects of the estate, who shall give the bond, and account as other special administrators are required to do."

Stat. 1861, 652, substituted in § 282 of Stat. 1851, the words, "probate court or judge," for "probate judge."

7 Cal. 231; 11 Cal. 128; 17 Cal. 237; 20 Cal. 316; 22 Cal. 67; 34 Cal. 468; Chapman *v.* Hollister, October Term, 1871.

§ 1412. (§ 89.) The appointment may be made out of term

time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person, in conformity with the order.

22 Cal. 67.

§ 1413 (§ 90.) In making the appointment of a special administrator, the probate judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

Stat. 1851, 453, inserted the words, "or person," after the word "person."

§ 1414. (§ 91.) Before any letters issue to any special administrator, he must give bond in such sum as the probate judge may direct, with sureties to the satisfaction of the judge, conditioned for the faithful performance of his duties; *and he must take the usual oath and have the same endorsed on his letters.*

7 Cal. 230.

§ 1415. (§ 92.) The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts and effects of the decedent, all incomes, rents, issues and profits, claims and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste and injury the real estate, and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator; he may sell such perishable property as the probate court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

Stat. 1851, 453, read: "The special administrator shall collect and preserve for the executor or administrator, all the goods, chatels and debts of the deceased, and for that purpose may commence and maintain suits as an administrator. He may sell such perishable estate as the probate court may order to be sold, and may exercise such other powers as may have been conferred upon him by his appointment; but in no case shall he be liable to an action by any creditor on a claim against the deceased."

§ 1416. (§ 93.) When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith

deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.

Stat. 1851, 458, inserted the words, "be permitted to" before "prosecute."

§ 1417. (§ 94.) The special administrator must render an account, on oath, of his proceedings, in a like manner as other administrators are required to do.

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

SECTION 1423. On proof of will, after grant of letters of administration, letters revoked.
1424. Power of executor in such a case.
1425. Remaining administrator or executor to continue when his colleagues are disqualified.
1426. Who to act when all acting are incompetent.
1427. Executor or administrator may resign, when. Court to appoint successor. Liability of out-goer.
1428. All acts of executor, etc., valid until his power is revoked.
1429. Transcript of court minutes to be evidence.

§ 1423. (§ 98.) If, after granting letters of admistration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct.

§ 1424. (§ 99.) In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, *recover* and collect all the rights, goods, chattels, *debts* and effects, of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

Stat. 1851, 459, inserted the words, "of the will" between the words "executor" and "or the administrator;" also the words, "may be admitted" between "may" and "prosecute."

§ 1425. (§ 96.) In case any one of several executors or administrators to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or

administrator must proceed to complete the execution of the will or administration.

Stat. 1851, 459, inserted the words, "according to law" after "annulled." 20 Cal. 311.

§ 1426. (§ 97.) If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the probate court must issue letters of administration with the will annexed, or otherwise, to the widow or next of kin, or others, in the same *order and* manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

Stat. 1851, 459, inserted the words "according to law" after "revoked."

32 Cal. 441.

§ 1427. (§ 100.) Any executor or administrator may, at any time, by writing, filed in the probate court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint *to receive the same.* If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the out-going executor or administrator or of the sureties on his bond, shall not be in any manner discharged, released or affected by such appointment *or resignation.*

Stat. 1858, 165, inserted the word, "provided" before "if," and omitted the word "however;" also substituted the words, "in the estate, shall in the opinion of the Court" for "therein;" also the words, "the powers or the letters testamentary or of administration" for "the letters;" also inserted the words, "as the case may require" between "general" and "in the same manner;" also the words, "of a special or general administrator in his stead," between "appointment" and "or resignation."

3 Cal. 289; 5 Cal. 443; 10 Cal. 110; 20 Cal. 310; 28 Cal. 187. Chapman *v.* Hollister, Oct. T. 1871.

Stat. 1851, 459, contained only the first sentence of § 1427, in substance omitting the italicized words.

3 Cal. 289; 5 Cal. 443; 10 Cal. 110; 20 Cal. 310; 28 Cal. 187. Chapman v. Hollister, Oct. T. 1871.

§ 1428. (§ 101.) All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid to all intents and purposes as if such executor or administrator had continued lawfully to execute the duties of his trust.

§ 1429. (§ 102.) A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.

ARTICLE IX.

DISQUALIFICATION OF JUDGES AND TRANSFERS OF ADMINISTRATIONS.

SECTION 1430. When judge not to act.
1431. Judge being disqualified, proceedings to be transferred, and where.
1432. Transfer not to change right to administer. Retransfer, how made.
1433. When proceedings to be returned to original court.

§ 1430. (§ 103.) No probate court shall admit to probate any will, or grant letters testamentary or of administration, in any case where the judge thereof is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is witness thereto, or is in any other manner interested or disqualified from acting.

Stat. 1863-4, 369, substituted the words, "of such court" for "thereof" after the word "judge;" Stat. 1851, 459, omitted the last clause, but was otherwise the same in substance.

37 Cal. 192.

§ 1431. (§ 104.) When a petition is filed in the probate court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the probate court for the settlement of an estate, and the presiding judge of the court is disqualified to act from any cause, upon his own or the motion of any person interested in the estate, he must make an order transferring the proceeding to the probate court of an adjoining county; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred, a certified copy of the order, and all the papers on file in his office in the proceeding; and thereafter the probate court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate.

Vide note to § 1433. 15 Cal. 220; 37 Cal. 192.

§ 1432. (§ 104.) The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order hereinbefore provided. If, before the administration is closed of any estate so transferred, as herein provided, another person is elected or appointed, and qualified, as probate judge of the county wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor.

Vide note to § 1433.

§ 1433. (§ 104.) On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such

change, the judge must make an order, transferring the proceeding back to the probate court where it was originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.

Stat. 1865-6, 328, contained the exact substance of last three sections.

Stat. 1851, 460, read: "When any probate judge, who would otherwise be authorized to act, shall be precluded from acting from the causes mentioned in the preceding section, or when he shall be in any manner interested upon a representation, and due proof thereof is made to the probate judge of an adjoining county, such judge shall be vested with all the powers and authority of the proper probate judge, in relation to the proof of any will and the granting of letters testamentary, or of administration thereon, and the granting of letters of administration in cases of intestacy, and shall retain jurisdiction as to all subsequent proceedings in regard to the estate."

Stat. 1863-4, 369, read: "§ 104. When the probate court of any county shall be precluded from admitting to probate a will, or granting letters testamentary or of administration, from any of the causes mentioned in the preceding section, the will may be proved, and letters testamentary or of administration may be granted, and all proceedings necessary thereto or consequent thereon may be had in the probate court of an adjoining county, and the probate judge and probate court of such adjoining county shall be vested with as full and complete power, authority and jurisdiction in the premises as would pertain to them if the testator or intestate had been a resident of such adjoining county at the time of his death, and shall retain jurisdiction in all subsequent proceedings in relation to the estate.

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

SECTION 1436. Suspension of powers of executor.
1437. Executor to have notice of his suspension, and to be cited to appear.
1438. Any party interested may appear on hearing.
1439. Notice to absconding executors and administrators.
1440. May compel attendance.

§ 1436. (§ 281.) Whenever the probate judge has reason to believe, from his own knowledge or from credible information, that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must by an order entered upon the minutes of the court suspend the powers of such executor or administrator, until the matter is investigated.

Stat. 1861, 651, substituted the words, "it shall be his duty" for "he must;" also, "has become" for "is" before the word "incompetent."

Stat. 1851, 485, omitted the words, "or has permanently removed from the State, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator;" but was otherwise the same as Stat. 1861.

6 Cal. 166; 10 Cal. 118.

§ 1437. (§ 283.) When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require.

§ 1438. (§ 284.) At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; *to which the executor or administrator may demur or answer, as*

hereinbefore provided. The issues raised must be heard and determined by the court

Stat. 1851, 485, substituted, "such allegations shall be heard and determined by the court," for the words italicized.

§ 1439. (§ 285.) If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

Stat. 1851, 485, substituted the words, "from the county" for "or absented himself from the State."

§ 1440. (§ 286.) In the proceedings authorized by the preceding sections of this article, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.

Stat. 1861, 652, substituted the word "chapter" for "article."
Stat. 1851, 485, inserted "five" before the words "preceding sections."
10 Cal. 118.

CHAPTER IV

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

ARTICLE I. INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.
II. EMBEZZLEMENT AND SURRENDER OF PROPERTY OF ESTATE.

ARTICLE I.

INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.

SECTION 1443. Inventory to be returned, including the homestead.
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1445. Oath of appraisers and inventory, how made.
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1449. To make oath to inventory.
1450. Letters may be revoked for neglect of administrator.
1451. Inventory of after discovered property.
1452. Administrator and executor to possess real and personal estate.
1453. Executor or administrator to deliver real estate to heirs or devisees at the end of ten months, unless there are debts to be satisfied.

§ 1443. (§ 105.) Every executor or administrator must make and return to the court, at its first term after his appointment, a true inventory and appraisement of all the estate of the decedent, *including the homestead, if any*, which has come to his possession or knowledge.

36 Cal. 506.

§ 1444. (§ 106.) To make the appraisement, the probate judge or court must appoint three disinterested persons (any two

of whom may act) who are entitled to receive a reasonable compensation for their services, *not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements.* If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the probate judge having jurisdiction of the estate or by the probate judge of such other county, *on request of the judge having jurisdiction.*

Stat. 1861, 634, substituted the words, "for the purpose of making" for "to make;" also, for the first italicized words, the words following: "to be allowed by the court or judge; their compensation as allowed shall be in the form of a bill of items of their services, including all necessary disbursements, which shall be sworn to by them and filed with the inventory, and which shall not exceed five dollars per day. If only one day's services are charged, the bill need not be sworn to."

Stat. 1851, 460, was same as 1861, omitting the words "including all necessary disbursements;" also, "if only one day's services are charged, the bill need not be sworn to;" also the words "or court" and "or judge."

§ 1445. (§ 107.) Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships and other interests, bonds, mortgages, notes and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, (if any) with their dates, and the sum which, in the judgment of the appraiser, may be collected on each debt, interest or security; the inventory must show, so far as the same can be ascertained by the executor or the administrator, what portion of the property is community property and what portion is the separate property of the decedent.

Stat. 1851, 460, omitted the last clause, beginning, "the inventory must show," &c.

§ 1446. (§ 108.) The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator; and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases

Stat. 1865-6, 765, inserted the words, "shall have come to his hands," between "none" and "the fact."

Stat. 1851, 460, omitted the last sentence.

§ 1447. (§ 109.) The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

Stat. 1851, 461, substantially the same, inserting the words, "in a will" after "as executor."

§ 1448. (§ 110.) The discharge or bequest in a will, of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

Stat. 1851, 461, substantially the same, inserting the words "in his will" after "named."

§ 1449. (§ 111.) The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.

Stat. 1861, 635, inserted the words, "before the probate judge, or the clerk of the court, or any," between "oath" and "officer;" also substituted "the executor, or administrator" for "affiant."

Stat. 1851, 461, was same as 1861, omitting therefrom the words, "or any officer authorized to administer oaths."

§ 1450. (§ 112.) If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall for reasonable cause allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, *or any person interested therein*, arising from such failure.

Stat. 1861, 635, substituted the words, "with or without notice" for "upon notice;" also, "for any injury sustained by the estate by his neglect," for the words, "for any injury to the estate, or any person interested therein, arising from such failure."

Stat. 1851, 461, omitted from 1861, the words, "or judge" and "with or without notice."

§ 1451. (§ 113.) Whenever property not mentioned in an inventory that is made *and filed*, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

Stat. 1851, 461, substituted "chapter" for "article;" omitted "thereof" after "inventory" and inserted it after "discovery."

§ 1452. (§ 114.) The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings and fixtures thereon, which are under his control. *The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting the title to the same, against any one except the executor or administrator.*

Stat. 1851, 461, substituted the words, "shall have a right to the" for "is entitled to the."

7 Cal. 230; 10 Cal. 120; 15 Cal. 260; 18 Cal. 459; 20 Cal. 627; 22 Cal. 16; 23 Cal. 29; 24 Cal. 88; 29 Cal. 510; 31 Cal. 604; 33 Cal. 667; 37 Cal. 431.

§ 1453. (§ 114.) Unless it satisfactorily appears to the probate court, that the rents, issues and profits of the real estate for a

longer period, are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent; or that it will probably be necessary to sell the real estate for the payment of such debts; at the end of ten months from the first publication of the notice to creditors, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees.

20 Cal. 627; 29 Cal. 514; 31 Cal. 604.

ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

SECTION 1458. Embezzling estate before grant of letters testamentary.
1459. Citation to person suspected to have embezzled estate, etc.
1460. Refusal to obey citation, penalty for, and for embezzlement. May be compelled to disclose by imprisonment. Liable for double damages.
1461. Persons entrusted with estate of decedent may be cited to account.

§ 1458. (§ 116.) If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled and alienated, to be recovered for the benefit of the estate.

14 Cal. 252; 29 Cal. 513.

§ 1459. (§ 117.) If any executor, administrator or other person interested in the estate of a decedent complains to the probate judge, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent, or has in his possession or knowledge, any deeds, conveyances, bonds, contracts or other writings, which contain evidences of, or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any last will, the judge may cite such person to appear before the probate court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where letters have been granted, he may be cited and examined, either before the probate court of the county where he is found, or before the court issuing the citation. But if in the latter case he appears

and is found innocent, his necessary expenses must be allowed him out of the estate.

Stat. 1851, 462, inserted the words, "heir, legatee, creditor," between "administrator" and "or other person."

§ 1460. (§ 118.) If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge, any deeds, conveyances, bonds, contracts or other writings, tending to disclose the right, title, interest or claim of the decedent to any real or personal estate, claim or demand, or any lost will of the decedent, the probate court may make an order requiring such person to disclose his knowledge thereof to the *executor or* administrator, and may commit him to the county jail, there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the probate court. The order for such disclosure, made upon such examination, is primary evidence of the right of such administrator to such property, in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

Stat. 1861, 635, inserted the words, "or her" after "to him," and also after "purpose commit him;" also the words, "or she" before "submit;" also substituted "which contain evidences of or tend" for "tending;" also the word "primary," for "*prima facie*."

Stat. 1860, 357, omitted all after the words, "filed in the probate court;" also inserted "to deliver the same" between "such person" and "to disclose."

Stat. 1851, 462, contained only the first sentence of § 1460, omitting the words, "or is discharged according to law," and added thereto the words, "and all such interrogatories and answers shall be in writing

and shall be signed by the party examined and filed in the probate court."

§ 1461. (§ 119.) The probate judge, upon the complaint, on oath, of any executor or administrator, may cite any person who has been entrusted with any part of the estate of the decedent, to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts or other *property or* papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section.

Stat. 1851, 462, substituted the word "answer" for "render."

CHAPTER V.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY, AND OF THE HOMESTEAD.

ARTICLE I. OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.
II. OF THE HOMESTEAD.

ARTICLE I

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

SECTION 1464. Widow and minor children may remain in decedent's house, etc.
1465. All property exempt from execution to be set apart for use of family.
1466. May make extra allowance.
1467. Payment of allowance.
1468. Property set apart, how apportioned between widow and children.
1469. Estates less than fifteen hundred dollars to go to wife and child; those less than three thousand to be summarily administered.
1470. When all property to go to children.

§ 1464. (§ 120.) When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the probate judge.

Stat. 1851, 462-3, inserted "child or" between "minor" and "children"; also between "widow" and "children."

15 Cal. 47; 29 Cal. 513.

§ 1465. (§ 121.) Upon the return of the inventory, or at any subsequent time during the administration, the court or the

probate judge may, on his own motion or on petition therefor, set apart for the use of the *surviving* husband or wife, or the minor children of the decedent, all property exempt from execution, including the homestead *selected*, designated *and recorded. If none has been selected, designated and recorded, the judge or the court must select, designate, set apart and cause to be recorded, a homestead for use of the persons hereinbefore named, in the manner provided in article two of this chapter, out of the real estate belonging to the decedent.*

Stat. 1869-70, 400, inserted "child or" between "minor" and "children"; also "personal" before "property"; also substituted the words "as designated by the general homestead laws, or by section one hundred and twenty-four of this act," for all that follows "homestead" in § 1465.

Stat. 1867-8, 172, read "Section 121. Upon the return of the inventory, or at any subsequent time during the administration, the court or probate judge may set apart, for the use of the family of the deceased, all personal property which is by law exempt from execution; and if no homestead has been selected under the general homestead law, shall also set apart, for the use of the family as a homestead, the dwelling-house occupied and used by the family as a residence at the time of such decease, if owned by the deceased; *provided*, however, that such homestead shall not include more than twenty acres of land, with the dwelling-house thereon, if situated without the limits of an incorporated city, town or village, or more than one lot of land in any incorporated city, town or village, with the dwelling-house thereon, to be selected by the widow, if there be one, and if not, then by the probate judge, and not to exceed in value the sum of five thousand dollars. If the homestead selected by the husband and wife, or either of them, under the general homestead law, has been included in the inventory, it shall be set off to the survivor of them, free from any further administration as a part of the estate; *provided*, that no lien or incumbrance upon such homestead premises shall be in any way affected by any of the provisions of this act."

Stat. 1865-6, 850, was same in substance as stat. 1869-70, substituting the words "the family" for "the husband or wife, or minor child or children"; adding also, the words, "whether the same has been recorded and dedicated as such, or not; *provided*, that no lien or incumbrance upon such homestead premises shall be in any way affected by any of the provisions of this act."

Stat. 1861, 636, same as stat. 1869-70, substituting "the family" for "the husband or wife, or the minor child or children."

Stat. 1851, 463, § 121, read: "Upon the return of the inventory, the court shall set apart, for the use of the widow, or minor child or children, all property which is by law exempt from execution, or so much of such property as may have belonged to the deceased."

8 Cal. 509; 23 Cal. 417; 29 Cal. 103; 35 Cal. 312, 323; 36 Cal. 16; 37 Cal. 181; 39 Cal. 666.

§ 1466. (§ 122.) If the amount set apart be insufficient for the support of the widow and children, or either, the probate court or judge must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the

settlement of the estate; which, in case of an insolvent estate, must not be longer than one year after granting letters *testamentary or* of administration.

Stat. 1861, 636, inserted "and child or" for "and."

Stat. 1851, 463, was same as stat. 1861, omitting "or judge"; and inserting at the beginning the words, "If the whole property exempt by law be not included in the inventory, and."

39 Cal. 86.

§ 1467. (§ 123.) Any allowance made by the court or judge, in accordance with the provisions of this *article*, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

Stat. 1863–4, 370, read "chapter" instead of "article"; also "testator or intestate" instead of "decedent"; also inserted the words "by the administrator" between "paid" and "in preference."

Stat. 1861, 636, was same as stat. 1863–4, omitting the last clause, beginning with the words "and any."

Stat. 1851, 463, was same as stat. 1861, substituting the words "of the preceding section" for "of this chapter."

§ 1468. (§ 125.) When property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow and no minor child, such property is the property of the widow. If he left also a minor child or children, the one-half of such property shall belong to the widow and the remainder to the child, or in equal shares to the children, if there are more than one. If there is no widow, the whole belongs to the minor child or children.

23 Cal. 417; 29 Cal. 104; 35 Cal. 323.

§ 1469. (§ 126.) If, on the return of the inventory of the estate of an intestate, it appears that the value of the whole estate does not exceed the sum of *fifteen hundred dollars*, the probate court, by a decree for that purpose, must assign for the use and support of the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children, if there are any, the whole of the estate, after the payment of the *expenses of his last illness*, funeral charges and expenses of the administration, and there must be no further proceedings in the administration unless further estate be discovered; and when

it so appears that the value of the whole estate does not exceed the sum of *three thousand dollars*, it is in the discretion of the probate court to dispense with the regular proceedings, or any part thereof, prescribed in this *title*, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters; the notice to creditors must be given to present their claims within four months after the first publication of such notice, *and those not so presented are barred as in other cases.*

Stat. 1861, 636, read, "five hundred dollars" instead of "fifteen hundred dollars", and "one thousand dollars" instead of "three thousand dollars"; also substituted the words, "the widow and minor child or children, if there be no widow," for the words, "the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children, if there are any."

Stat. 1851, 464, omitted all following the word "discovered"; and the words "expenses of his last illness"; read "five hundred dollars" instead of "fifteen hundred dollars"; also, substituted the words, "the widow and minor children of the intestate, or for the support of the minor child or children, if there be no widow," for the words last quoted under stat. 1861, *supra*.

§ 1470. (§ 127.) If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this *article*, the whole property so set apart, *other than her half of the homestead*, must go to the minor children.

ARTICLE II.

OF THE HOMESTEAD.

SECTION 1474. Rights of survivor to homestead.
1475. Selected and recorded homestead set off to person entitled. Subsisting liens to be paid by solvent estate.
1476. Appraisers to carve out of the original exceeding five thousand dollars in value, a homestead, and report the same.
1477. Report of the appraisers. Majority and minority, which may be confirmed.
1478. Day to be set for confirming or rejecting the report of the appraisers. Appeal.
1479. If report rejected, other appraisers appointed. If again rejected, partition suit to be brought.
1480. Instead of dividing the homestead, who may take a deed thereof at appraised value.
1481. If no homestead is selected and recorded prior to death of decedent, one may be petitioned for.
1482. Court to direct partition suit in the district court, when. Proceedings thereon.
1483. If property is common or separate, court to cause appraisement and admeasurement to be made.
1484. New appraisement, when ordered. Instead of deeding property at appraised value, public sale to be ordered, when.
1485. Costs, to whom chargeable. Persons succeeding to rights of homestead owners have all their powers and rights.
1486. Certified copies of certain orders to be recorded.

§ 1474. The homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both are living, on the death of the husband or wife, vests absolutely in the survivor, and is not, nor is the proceeds of a sale thereof, subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either

of them, previous to or at the time of the death of such husband or wife, except such mortgage or lien as the homestead was subject to at the time of the death of such husband or wife.

This section was never enacted as a section of the practice or probate act.

Stat. 1862, 519, § 4, read: "The homestead property selected by the husband and wife, or either of them, according to the provisions of said act, shall upon the death of the husband or wife vest absolutely in the survivor, and be held by the survivor as fully and amply as the same was held by them, or either of them, immediately preceding the death of the deceased, and shall not be subject to the payment of any debt or liability contracted by or existing against the said husband and wife, or either of them, previous to, or at the time of the death of such husband or wife, except such debt or liability as the homestead was subject to at the time of the death of such husband or wife."

For prior provisions, *vide* Stat. 1860, 312, § 4, and Stat. 1851, 298, § 10.

4 Cal. 273; 8 Cal. 509; 14 Cal. 478; 16 Cal. 216; 23 Cal. 418; 25 Cal. 114; 29 Cal. 103; 30 Cal. 105; 31 Cal. 531; 35 Cal. 323; 36 Cal. 16; 37 Cal. 182; 39 Cal. 666; *Rich* v. *Tubbs*, January Term, 1871.

§ 1475. (§ 121.) If the homestead selected and recorded prior to the death of the decedent is returned in the inventory appraised at not exceeding five thousand dollars in value, the probate court must by order set it off to the persons in whom title is vested by the preceding section. If there are subsisting liens or encumbrances on the homestead, they must be paid out of the funds of the estate, if there remain sufficient for that purpose, after the payment of all claims allowed against the estate.

Vide § 1465, § 1474 and notes; also, Stat. 1869–70, 793, for the last enactment on the subject which is entirely new.

8 Cal. 509; 14 Cal. 478; 23 Cal. 417; 35 Cal. 312, 323; 36 Cal. 16; 37 Cal. 182.

§ 1476. (N. S.) If the homestead, as selected and recorded, is appraised at more than five thousand dollars, the appraisers must, before they make their return, admeasure and set apart such portion of the original homestead, including the residence, or such portion of the residence as does not exceed five thousand dollars in value, and make report thereof, giving the metes, bounds and full description of the property and appurtenances by them set apart as a homestead; the appraisers must at the same time report the value of the entire house, if they have partitioned it; also, the house and the largest portion of the im-

mediately adjacent land and buildings which together do not exceed five thousand dollars in value.

§ 1477. (N. S.) Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

§ 1478. (N. S.) When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. There must be given the same notice thereof as is required in article one, chapter two, of the probate of a will. The objections must be in writing, and, together with such witnesses as may be produced for and against the report, be heard by the court. If the court is satisfied that the appraisement, or the partition and appraisement, was fairly and honestly conducted and made, the report, appraisement and partition must be confirmed; if not, rejected.

§ 1479. (N. S.) If the report is rejected and no appeal is taken therefrom, or if from any cause the first appraisers fail to make the required report, the court must appoint three disinterested householders, residents of the county, to appraise and admeasure the homestead, who must be sworn thereto, perform the duties and make report thereof, and the same proceedings for the confirmation or rejection thereof must be had, as provided in the two preceding sections. If the report is again rejected, and no appeal is taken, the court must direct the homestead claimant to bring action for partition of the homestead, in the district court, and must set apart the homestead as directed by the district court.

§ 1480. (N. S.) Instead of dividing a house or the land embraced in the homestead selected and recorded, the person entitled to the homestead by descent has the right to pay to the estate the excess of value at which the same is appraised over five thousand dollars, and the court must make an order directing

the executor or administrator to execute a deed therefor, conveying to him all the interest of the estate therein. If the claimant declines to make such payment, and prefers receiving the value of the homestead rather than a partition between him and the estate, any of the heirs or devisees may pay the appraised value and take a deed from the estate and the homestead claimant. Five thousand dollars of the purchase money must be paid by order of the court, to the person entitled to the homestead.

§ 1481. (N. S.) If no homestead is selected, designated and recorded prior to the death of the decedent, any of the persons named in section fourteen hundred and seventy-four, entitled to succeed to a homestead, may petition the probate court to admeasure, appraise and set apart to them a homestead, from the real estate belonging to the decedent. The petition must set forth the name of petitioner, his relation to decedent, the land from which it is desired to make the selection, the portion thereof selected and its estimated value, and whether the same is community or separate property of the decedent, or owned by decedent as joint tenant, or tenant in common.

10 Cal. 296; 35 Cal. 315; 37 Cal. 182.

§ 1482. (N. S.) If the land from which the selection of the homestead is to be made is owned by the decedent as joint tenant, or tenant in common, the probate court must so order, and the executor or administrator must proceed to have partition thereof made by action in the district court, as provided in this code; and when partition is so made and certified to the probate court, the probate court must, if the portion set apart to the estate does not exceed five thousand dollars in value, set the same apart to the claimant, if entitled thereto, and cause the same to be recorded; or, if a sale is had of the land by decree of the district or probate court, the proceeds of the sale belonging to the estate, not exceeding five thousnnd dollars, must be paid to such claimant.

§ 1483. (N. S.) If the land and appurtenances from which the selection of a homestead is sought, is community or separate property of the decedent, on filing the petition the court must

appoint appraisers and cause the same to be admeasured, appraised, reported and confirmed or rejected, as provided in the preceding sections of this article.

10 Cal. 296.

§ 1484. (N. S.) If it is made to appear to the probate court that any appraisement of property, constituting the homestead or from which it is claimed, is either too high or too low, or is unfairly or fraudulently made, the appraisement, by order of the court, must be annulled and another had, as provided in this article in case of rejection of a report. Instead of allowing the homestead claimant, or other heirs or devisees, to take the property in this section before mentioned, at its appraised value, as provided in section fourteen hundred and eighty, the court may, in its discretion, or on petition, direct a sale thereof to be had at public auction, after notice of sale given as provided for sales of real estate of a decedent in the course of administration, for the payment of debts or legacies. If more than five thousand dollars is not bid, no sale shall take place, but on report of the facts the property must be set apart as a homestead.

§ 1485. (N. S.) The costs of all proceedings in the probate court, provided for in this chapter, must be paid by the estate, as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.

§ 1486. (N. S.) A certified copy of every final order made in pursuance of this article by which a report is confirmed, property assigned or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated.

CHAPTER VI.

OF CLAIMS AGAINST THE ESTATE.

SECTION 1490. Notice to creditors. Additional notice.
1491. Time expressed in the notice.
1492. Copy and proof of notice to be filed and order made.
1493. Time within which claims against an estate must be presented.
1494. Claims to be sworn to, and when allowed, to bear same interest as judgments.
1495. Probate judge may present claim, and action thereon.
1496. Allowance and rejection of claims.
1497. Approved claims or copies to be filed. Claims secured by liens may be described. Lost claims.
1498. Rejected claims to be sued for within three months.
1499. Claims barred by statute of limitations. When and who probate judge may examine.
1500. Claims must be presented before suit.
1501. Time of limitation.
1502. Claims in action pending at time of decease.
1503. Allowance of claim in part.
1504. Effect of judgment against executor.
1505. Execution not to issue after death. If one is levied the property may be sold.
1506. What judgment is not a lien on real property of estate.
1507. May refer doubtful claims. Effect of referee's allowance or rejection.
1508. Trial by referee, how confirmed and its effect.
1509. Liability of executor, etc., for costs.
1510. Claims of executor, etc., against estate.
1511. Executor neglecting to give notice to creditors, to be removed.
1512. Executor to return statement of claims.

§ 1490. (§ 128.) Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims

against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation.

Stat. 1861, 636, inserted the words, "within ten months after the first publication of the notice," between "vouchers" and "to the executor"; also, substituted, "the expiration of the ten months after the first publication of such notice," for "the time expressed in the notice"; also, "portion of the ten months," for "time allowed for such presentation."

Stat. 1851, 464, was same as Stat. 1861, omitting all after the words, "four weeks" therefrom.

6 Cal. 667; 9 Cal. 636; 19 Cal. 331; 21 Cal. 31; 24 Cal. 498; 36 Cal. 438; 38 Cal. 87.

§ 1491. (§ 128.) The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not.

Vide § 1490 and note; also, § 1469.

§ 1492. (§ 129.) After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court.

Stat. 1861, 637, was same in substance.

Stat. 1851, 464, read: "After the notice shall have been published, a copy thereof, together with an affidavit attached thereto, of the publisher or printer of the paper in which the same was published, shall be filed by the executor or administrator."

38 Cal. 87.

§ 1493. (§ 130.) If a claim is not presented within the time limited in the notice, it is barred forever, except as follows: If it is not then due, or if it is contingent, it may be presented within *one* month after it becomes due or absolute; when it is made to appear by the affidavit of the claimant, to the satisfaction

of the executor or administrator and the probate judge, that the claimant had no notice, as provided in this *chapter*, by reason of being out of the state, it may be presented any time before a decree of distribution is entered; *a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged, must be presented within one month after such deficiency is ascertained.*

Stat. 1860, 17, read: "Within ten months after the first publication of the notice," instead of "within the time limited in the notice"; also, "ten months," instead of "one month."

Stat. 1851, 464, omitted all after the words, "due and absolute"; read: "ten months," instead of "one month"; also, "within ten months after first publication of notice," instead of, "within the time limited in the notice."

6 Cal. 392, 412, 667; 9 Cal. 636, 643; 10 Cal. 384, 482; 18 Cal. 428; 19 Cal. 86; 21 Cal. 32; 22 Cal. 98; 24 Cal. 498; 27 Cal. 354; 29 Cal. 104, 122; 34 Cal. 264, 504; 36 Cal. 438; 38 Cal. 87; 39 Cal. 231; *Pico* v. *De La Guerra*, April Term, 1861.

§ 1494. (§ 131.) Every claim presented to the administrator must be supported by the affidavit of the claimant, *or some one in his behalf*, that the amount is justly due, that no payments have been made thereon *which are not credited*, and that there are no offsets to the same, to the knowledge of the claimant or affiant. When the affidavit is made by person other than the claimant, he must set forth in the affidavit the reasons why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate is insolvent no greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed on judgments obtained in the district court.

An act supplementary to an act entitled an act to regulate the settlement of the estates of deceased persons, passed May 1, 1851. *Approved March* 30, 1872.

[§ 1. When it shall appear upon the settlement of the accounts of any executor or administrator that debts against the deceased have been paid without the affidavit and allowance prescribed by section one hundred and thirty-one of the act to which this act is supplementary, and it shall be proven by competent evidence to the satisfaction of the probate court that such debts

were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts.

Took effect immediately.]

Stat. 1861, 637, substituted for the last sentence, beginning with, "if the estate," the words, "the amount of interest shall be computed, and included in the statement of the claim, and the rate of interest determined. In case the estate is insolvent, no claim contracted after the passage of this act shall bear greater interest than ten per cent. per annum, from and after the time of issuing letters."

Stat. 1869, 17, omitted the words, "which are not credited"; also, all after the words, "in support of the claim."

Stat. 1851, 464, omitted the words, "or some one in his behalf"; "which are not credited"; "or affiant"; "when the affidavit is made by any other person than the claimant, he must set forth in the affidavit the reasons why it is not made by the claimant"; and also, all after the words, "in support of the claim."

6 Cal. 336, 412, 666; 9 Cal. 636; 14 Cal. 172, 180; 18 Cal. 376, 427; 19 Cal. 97; 21 Cal. 24; 27 Cal. 353; 38 Cal. 87.

§ 1495. (§ 131.) Any probate judge may present a claim against the estate of the decedent, for allowance, to the executor or administrator thereof; and if the executor or administrator allows the claim, he must, in writing, designate some probate judge of an adjoining county, who, upon the presentation of such claim to him, is vested with the same power to allow or reject it as he would have if the will had been proved or administration granted in his own county; and the probate judge presenting such claim, in case of its rejection by the executor or administrator, or by such probate judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

Stat. 1856, 93. 6 Cal. 666; 19 Cal. 97; 38 Cal. 87.

§ 1496. (§ 132.) When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the probate judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent

to a rejection; and if the presentation be made by a notary, the certificate of such notary, under seal, is primary evidence of such presentation and rejection. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is *presented in time*, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

Stat. 1861, 637, read: "*Prima facie*," instead of "primary"; also, "valid," instead of "presented in time."

Stat. 1851, 464, omitted all after the words, "allowance or rejection."

6 Cal. 669; 7 Cal. 215; 18 Cal. 427; 21 Cal. 24; 23 Cal. 362; 26 Cal. 429; 34 Cal. 226; 38 Cal. 87.

§ 1497. (§ 133.) Every claim allowed by the executor or administrator, and approved by the probate judge, *or a copy thereof, as hereinafter provided*, must within thirty days thereafter be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note or *any* other instrument, *a copy of such* instrument must accompany the claim, *and the original instrument must be exhibited if demanded, unless it is lost or destroyed*, in which case the claimant must accompany his claim by his affidavit containing a *copy or* particular description of such instrument, and stating its loss or destruction. If the claim or any part thereof is secured by a mortgage or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it is sufficient to describe the mortgage or lien and refer to the date, volume and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then attached to his claim.

A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest and date of allowance.

Stat. 1861, 638, provided that in case of claims founded on a bond, bill, note or other instrument, the original instrument should be presented, and the allowance and approval, or rejection, indorsed thereon: in case of loss or destruction, the same indorsement to be made on the affidavit of loss or destruction; also, that the mortgage or other evidence of lien,

should be attached to, and filed with, the claim, unless recorded, etc., and then the reference was sufficient. In other respects it was in substance the same as § 1497.

Stat. 1860, 18, omitted all after the words, "due course of administration."

Stat. 1851, 465, was same as Stat. 1860, omitting therefrom the words, "and approved by the probate judge."

6 Cal. 412, 660; 7 Cal. 228; 9 Cal. 636; 18 Cal. 430; 21 Cal. 29; 23 Cal. 363; 24 Cal. 498; 27 Cal. 354; 29 Cal. 104, 122; 38 Cal. 87.

§ 1498. (§ 134.) When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after the date of its rejection, if it be then due, or within *two* months after it becomes due, otherwise the claim is forever barred.

Stat. 1851, 465, read: "three," instead of "two," in italics.

6 Cal. 669; 10 Cal. 386; 18 Cal. 428; 21 Cal. 29; 34 Cal. 226; 38 Cal. 87.

§ 1499. (§ 135.) No claim must be allowed by the executor or administrator, or by the probate judge, which is barred by the statute of limitations. When a claim is presented to the probate judge for his allowance, he may, in his discretion, examine the claimant and others, on oath, and hear any other legal evidence touching the validity of the claim.

Stat. 1851, 465, omitted all after the word, "limitations"; but the balance was added by Stat. 1863–4, 370.

2 Cal. 386; 6 Cal. 669; 10 Cal. 386; 18 Cal. 428; 19 Cal. 83, 87, 97; 23 Cal. 363; 38 Cal. 87. *Hall & Smith* v. *Hall*, April Term, 1861.

§ 1500. (§ 136.) No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, ~~except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where a recourse against any other property of the estate is expressly waived in the complaint.~~

6 Cal. 392; 10 Cal. 386, 559; 18 Cal. 428; 21 Cal. 29; 24 Cal. 501; 27 Cal. 354; 29 Cal. 104, 122; 38 Cal. 3, 87.

§ 1501. (§ 137.) The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed.

6 Cal. 669; 38 Cal. 87.

§ 1502. (§ 138.) If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations *required*.

6 Cal. 669; 28 Cal. 568; 38 Cal. 87. *Bank of Stockton* v. *Howland*, October Term, 1871.

§ 1503. (§ 139.) Whenever any claim is presented to an executor or administrator, or to the probate judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed.

6 Cal. 669; 9 Cal. 636; 21 Cal. 31; 38 Cal. 87.

§ 1504. (§ 140.) A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment.

6 Cal. 412, 669; 9 Cal. 127, 136; 13 Cal. 136; 18 Cal. 378; 21 Cal. 29; 29 Cal. 362; 34 Cal. 226; 38 Cal. 87, 378; *Bank of Stockton* v. *Howland*, October Term, 1871.

§ 1505. (§ 141.) When any judgment has been rendered *for or* against the testator or intestate in his lifetime, no execution shall issue thereon after his death, except as provided in section six hundred and eighty-six, a judgment against the decedent for the recovery of money, must be presented to the executor or administrator, like any other claim. If execution is actually levied upon any property of the decedent before his

death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands.

Stat. 1861, 638, read: "When any judgment has been rendered against the testator, or intestate, in his life, no execution shall issue thereon after his death; but a certified copy of such judgment shall be presented to the executor, or administrator, *and be allowed and filed, or rejected*, as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration; *provided*, however, that if the execution shall have been actually levied upon any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor, or administrator, for any surplus in his hands. The executor, or administrator, may, however, require the affidavit of the claimant, or other satisfactory proof, that the judgment, or any portion thereof, is justly due and unsatisfied."

9 Cal. 127, 429; 14 Cal. 641; 19 Cal. 100; 22 Cal. 99; 37 Cal. 143; 38 Cal. 378.

Stat. 1851, 465, was same as Stat. 1861, omitting therefrom the words in italics; and all after the words, "surplus in his hands."

Vide §§ 686, 669.

§ 1506. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration

Vide § 669: Stat. 1851, 82.

§ 1507. (§ 142.) If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person to be approved by the probate judge. Upon filing the agreement and approval of the probate judge in the office of the clerk of the district court for the county in which the letters testamentary or of adminis-

1505. When any judgment has been rendered for or against the testator intestate in his lifetime, no execution shall issue thereon after his death, except as provided in § 686. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. *A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.* (In effect March 28, 1874.)

pointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

§ 1509. (§ 144.) When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

6 Cal. 169, 667.

§ 1510. (§ 145.) If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the probate judge, and its allowance by the judge is sufficient evidence of its correctness, *and it must be paid as other claims, in due course of administration. If, however, the probate judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the probate judge, who may appoint an attorney at the expense of the estate, to defend the action. If the claimant recovers no judgment he must pay all costs, including defendant's attorney's fees.*

Approved February 1, 1872.—[§ 145. If the executor or administrator is himself a creditor of the testator or intestate, his claim, duly authenticated by affidavits, shall be presented for allowance or rejection, to the probate judge, and its allowance by the judge shall be sufficient evidence of its correctness. If the probate judge reject the claim, the executor or administrator may commence an action in any court of competent jurisdiction within ninety days thereafter, against the estate of the testator or intestate, to establish the correctness of the claim. Immediately after commencing such action, he shall notify the probate judge

thereof in writing, who shall thereupon appoint some suitable attorney to appear and defend the estate in such action. *Provided*, if the probate judge fail to appoint an attorney, or if no attorney appear in the action within ten days after such appointment, the court in which the action is pending, on application, shall appoint an attorney. The court before which such action is tried shall allow said attorney such compensation as it deems just and reasonable, said compensation to be taxed as costs in the case, and recovered from the party against whom judgment is rendered.

10 Cal. 482; 16 Cal. 434; 21 Cal. 31.

§ 1511. (§ 146.) If an executor or administrator neglects for two months after his appointment to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, *and appoint some other person in his stead, equally or the next in order entitled to the appointment.*

§ 1512. (§ 147.) At the same term at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court; and from term to term thereafter he must present a statement of claims subsequently presented to him. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him.

9 Cal. 636; 21 Cal. 32.

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

ARTICLE I SALES IN GENERAL.
II. SALES OF PERSONAL PROPERTY.
III. SUMMARY SALES OF MINES AND MINING INTERESTS.
IV. SALES OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF

ARTICLE I.

SALES IN GENERAL.

SECTION 1516. Personal estate first chargeable. Real estate, when sold.
1517. No sales valid except by order of probate court.
1518. Applications for orders of sale.
1519. But one petition, order and sale must be had when it is possible to do so.

§ 1516. (§ 115.) The personal estate of a decedent which comes into the hands of the executor or administrator is first chargeable with the payment of the debts and expenses; if the goods, chattels, rights and credits in the hands of the executor or administrator are not sufficient to pay the debts of the decedent, the expenses of administration and the allowance to the family, the whole of the real estate may be sold for that purpose by the executor or administrator, in the manner prescribed *in article seven of chapter four of this title.*

Stat. 1851, 461, substituted the words "by this Act" for the italicised words.

20 Cal. 313; 31 Cal. 604.

§ 1517. (§ 148.) No sale of any property of an estate of a decedent is valid, unless made under order of the probate court, except as otherwise provided in this chapter. *All sales must be*

reported under oath and confirmed by the probate court, before the title to the property sold passes.

Stat. 1861, 639, omitted italicized words, and read: "act or other acts," instead of "chapter."

Stat. 1851, 467, omitted all after the words, "of the probate court."

9 Cal. 127; 14 Cal. 642; 18 Cal. 291, 303; 21 Cal. 29.

§ 1518. (§ 149.) All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined.

§ 1519. When it can be made to appear to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration and debts, there must be but one petition filed, but one order of sale made, and but one sale had. The probate court, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there is no more estate than sufficient to pay the same, must require but one proceeding for the sale of the entire estate. In such case, the petition must set forth all the facts required by section fifteen hundred and thirty-seven.

ARTICLE II.

SALES OF PERSONAL PROPERTY.

SECTION 1522. Perishable and depreciating property to be sold.
1523. Order to sell personal property.
1524. Partnership interests and choses in action, how sold.
1525. Order of sale, what to direct and what to be first sold.
1526 Sale of personal property.

§ 1522. (§ 150.) At any time after receiving letters, the executor, administrator or special administrator may apply to the court or judge and obtain an order to sell perishable *and other personal* property *likely to depreciate in value, or which will incur loss or expense by being kept,* and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator or special administrator is responsible for the property, unless, after making a sworn return and on a proper showing, the court shall approve the sale.

Vide § 1523 and note.

§ 1523. (§ 150.) If claims against the estate have been allowed, and a sale of property is necessary for their payment or the expenses of administration, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application, either in vacation or term, from time to time, so long as any personal property remains in his hands and sale thereof is necessary. If it is made to appear for the best interest of the estate, he may, at any time after filing the inventory, in like manner and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, *whether necessary to pay debts or not.*

Vide § 1522.

Stat. 1861, 639, read: "If there be delay in obtaining such order, such property may be sold without an order of sale," instead of "the order of sale may be made without notice."

Stat. 1860, 175, read: "At the term of the court to which the inventory is returned," instead of, "at any time after receiving letters"; also, omitted the word, "special"; also, all after the words, "family of the decedent."

Stat. 1851, 467, was the same as Stat. 1860, omitting therefrom the words "and if he deem it for the best interest of the estate, he may at any time after the filing of the inventory, make an application in like manner, and after giving notice, for an order to sell the whole of the personal property belonging to the estate."

Stat. 1865-6, 765-6, read as follows: "§ 4. Perishable property of any estate may be sold as provided by law, and shall include all personal property which is likely to decrease in value, or become worse by being kept, or is subject to loss or expense, so that it shall appear to be for the best interest of the estate that the same should be sold without delay. Partnership interests, or interests belonging to any estate by virtue of any partnership formerly existing, and choses in action, may be sold in the same manner as other personal property, when it shall appear to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or partners or to any other person, the court or judge shall carefully inquire into the condition of the partnership affairs, and shall examine the surviving partner or partners, if he or they shall be in the county and able to be present in court, and no such sale shall be confirmed, unless the same shall appear to be for the best interest of the estate."

§ 1524. Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interests in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

Vide note to § 1522.

§ 1525. (§ 151.) If it appears that a sale is necessary *for the payment of debts or the family allowance*, or for the best interest of the estate *and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance*, the court or judge must order it to be made. In making *orders and sales for the payment of debts or family allowance*, the court or judge must *so* direct, *and* such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold. Articles bequeathed must not be sold to pay debts *or*

family allowance, until all other personal estate has been applied to the payment thereof.

Stat. 1861, 639, and 1860, 175, are substantially § 1525, omitting the words in italics.

Stat. 1851, 467, omitted, "or for the best interest of the estate"; also words in italics.

13 Cal. 605; 32 Cal. 667.

§ 1526. (§§ 152, 153.) The sale of personal property must be made at public auction, and after public notice, given for at least ten days, by notices posted in three public places in the county, or by publication in a newspaper, *or both*, containing the time and place of sale, *and a brief description of the property to be sold*; unless, for good reason shown, the probate court or judge orders a private sale, or a shorter notice. Public sales of such property must be made at the court-house door, at the residence of the decedent, or at some other public place, but no sale shall be made of any property which is not present at the time of selling it, *unless the court otherwise order*.

Stat. 1861, 640, contained the words, "but no private sale shall be effectual for any purpose till the same shall be approved by the probate judge"; also, "to be mentioned in the notice," after "public place"; but omitted italicized words.

Stat. 1855, 300, substantially same as Stat. 1861, omitting the words, "or a shorter notice."

Vide § 1517.

10 Cal. 119; 17 Cal. 344.

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

SECTION 1529. Mines may be sold, how.
1530. Petition for sale, who may file and what to contain.
1531. Order to show cause, how made and on what notice.
1532. Order of sale, when and how made.
1533. Further proceedings to conform to articles two and four.

§ 1529. When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines or interests in mines, such mines, or interests, may be sold under the order of the probate court having jurisdiction of the estate, as hereinafter provided.

Stat. 1865-6, 359, § 1, inserted the words, "or of shares, interest or stocks in a mining corporation," between "mines" and "such mines."
22 Cal. 277.

§ 1530. The executor, administrator, or any heir at law, or creditor of the estate, any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the probate court a petition in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company in which such interests or shares are held, and the grounds upon which the sale is asked to be made.

Stat. 1865-6, 359, § 2, same in substance.

§ 1531. Upon the presentation of such petition the probate judge must make an order directing all persons interested to appear before him at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mines, mining interests, shares or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the

time appointed for hearing the petition, or published at least four successive weeks in such newspaper as the court shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with.

Stat. 1865-6, 359, § 3. 22 Cal. 277

§ 1532. If, upon hearing the petition, it appears to the satisfaction of the probate judge that it is to the interest of the estate that such mining property or interests of the estate should be sold, or if it appears to his satisfaction that an immediate sale is necessary in order to secure the just rights or interests of the mining partners or tenants in common, in which such shares or property are held, such probate judge must make an order authorizing the executor or administrator to sell such mining interests, mines or shares, as hereinafter provided.

Stat. 1865-6, 359, § 4, same in substance.

§ 1533. After the order of sale is made, all further proceedings for the sale of such mining property, *and for the notice, report and confirmation thereof*, must be in conformity with the provisions of article four of this chapter.

Stat. 1865-6, 359, § 5, substituted, "laws providing for the sale of other real property, under the orders of the probate court," for "article four of this chapter"; also, added the words, "and whenever such mining interest shall consist of stocks or shares held and owned as personalty, such further proceedings for the sale thereof, after the order of sale, shall be in conformity with the law providing for the sale of other personal property of an estate."

ARTICLE IV.

THE SALE OF REAL ESTATE, INTERESTS THEREIN AND CONFIRMATION THEREOF.

SECTION 1536. To sell real estate, when.
1537. Verified petition for sale, what to contain and to what it may refer.
1538. Order to persons interested to appear.
1539. Copy to be served, assent given, or publication made.
1540. Hearing after proof of service. Presentation of claims.
1541. Administrator, executor and witnesses may be examined.
1542. To sell real estate or any part, when.
1543. Order of sale, when to be made.
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§ 1536. (§ 154.) When the personal estate in the hands of the executor or administrator *is exhausted or* insufficient to pay the allowance of the family, the debts outstanding against the decedent, and the debts, expenses and charges of administration, the executor or administrator may sell the real estate for that purpose, upon the order of the probate court.

Stat. 1861, 640.

Stat. 1851, 467, omitted the words, "the debts outstanding against the decedent"; also, "expenses"; and read: "county judge," instead of "probate court." (*Vide* Stat 1865–6, 359, for provisions concerning the summary sale of mines and mining interests belonging to estate of deceased.)

12 Cal. 200; 13 Cal. 576; 16 Cal. 500; 19 Cal. 207; 20 Cal. 124, 313; 22 Cal. 275; 31 Cal. 605; 32 Cal. 241; 33 Cal. 665; 36 Cal. 650; 39 Cal. 179.

§ 1537. (§ 155.) To obtain such order, he must present a verified petition to the probate court, or to the judge at chambers, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a description of all the real estate of which the decedent died seized or in which he had any interest,

or in which *the estate* has acquired any interest, and the condition and value of the respective portions and lots thereof, and whether the same be community or separate property; the names and ages of the devisees, if any, and of the heirs of the decedent. If all the matters above enumerated cannot be ascertained, it must be so stated in the petition

Stat. 1861, 640, read: "the intestate," instead of, "the estate thereof"; also, inserted between "heirs of the decedent," and "if all the matters," the words, "which petition shall be verified by the oath of the party presenting the same; if the inventory and appraisement on file contain a full description of the personal estate of the deceased and of all the real estate of which the testator, or intestate, died seized, or in which he had any interest, or in which the estate has acquired any interest, such inventory, by a proper reference, may be made a part of the petition for a description of the personal estate, or real estate, or both, and if the same be full as to all property, except property subsequently discovered or subsequently received, such reference may be had to the inventory, and the additional property may be set forth in the petition."

Stat. 1851, 467, read: "To obtain such order, he shall present a petition to the probate court, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of, the debts outstanding against the deceased as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, and the condition and value of the respective portions and lots, the names and ages of the devisees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of the party presenting the same."

13 Cal. 576; 16 Cal. 500; 19 Cal. 207, 410; 20 Cal. 123, 313; 31 Cal. 570; 33 Cal. 665; 36 Cal. 689.

§ 1538. (§ 156.) If it appears to the court or judge, from such petition, that it is necessary to sell the whole or some portion of the real estate for the purposes *and reasons* mentioned in the preceding section, or any of them, such petition must be filed and an order thereupon made, directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

Stat. 1861, 640.

Stat. 1851, 468 read: "§ 156. If it shall appear by such petition that there is not sufficient personal estate in the hands of the executor or administrator to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts, the probate judge shall thereupon make an order directing all persons interested to appear before him at a time and place specified, not less than four, nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the deceased as shall be necessary to pay such debts."

7 Cal. 229; 9 Cal. 195; 13 Cal. 576; 16 Cal. 500; 19 Cal. 162; 20 Cal. 124, 313; 33 Cal. 54; 36 Cal. 690.

§ 1539. (§§ 157, 159.) A copy of the order to show cause must be personally served on all persons interested in the estate and on any general guardian of any minor, devisee or heir of the decedent resident in the county, at least ten days before the time appointed for hearing the petition, or must be published at least four successive weeks, in such newspaper as the court or judge shall direct. The notice is served if the publication is completed ten days before the day set for hearing. If all persons interested in the estate *join in the petition for the sale*, or signify in writing their assent thereto, the notice may be dispensed with.

Stat. 1861, 641, §§ 157, 159, read: "§ 157. A copy of such order to show cause shall be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or shall be published at least four successive weeks in some newspaper, as the court or judge shall order; *provided*, however, if all persons interested in the estate shall signify in writing their assent to such sale, the notice may be dispensed with."

"§ 159. If any of the devisees, or heirs, of the deceased, are minors, and have a general guardian in the county, a copy of the order shall be served upon the guardian at least ten days before the actual hearing. If they have no guardian, the court or judge shall, at the time of filing the petition, or before proceeding to act upon the petition, appoint some disinterested person their attorney, for the sole purpose of appearing for them and taking care of their interest in the proceedings. The court may, also, upon the hearing, if it be deemed necessary, appoint such attorney for the heirs, or devisees, if they are unrepresented, whether minors, or otherwise, and may likewise appoint an attorney for the creditors, if they are unrepresented. If such guardian of the minors, or such attorney for minors, or others, appear on the hearing, such appearance shall be evidence of service of notice upon such guardian, or attorney."

Stat. 1851, 468, omitted from Stat. 1861, § 159, all after the word, "proceedings," and "guardian" instead of "attorney"; also omitted the words, "at least ten days before the actual hearing"; also, at the time of filing the petition"; § 157, was same as § 157, Stat. 1861, omitting the words "or judge."

Stat. 1863-4, 367, § 23, read: "Whenever all the heirs of a deceased person are of full age, the probate court having jurisdiction of the estate of such deceased person shall have authority, on the written petition or consent of all the heirs, to order a sale of the whole or any part of the real estate belonging to such deceased person; and in such case the petition for such sale need only set forth the fact of such consent of the majority of such petitioners, and describe the premises to be sold, with reasonable certainty."

16 Cal. 503; 20 Cal. 124; 33 Cal. 51.

§ 1540. (§ 158.) The probate court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of *personal* service or publication of a copy of the order, by affidavit or otherwise, if

the consent, in writing, to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing.

Stat. 1861, 641, added the words, "and if approved by the executor, or administrator, and the probate judge, shall not be subject to review except on appeal"; also, read: "due" instead of, "personal"; also, read: "or upon filing the consent in writing to such sale of all parties interested"; instead of, "if the consent in writing to such sale of all parties interested, is not filed"; also inserted the words, "and if such consent be not filed," between "hear the petition" and "and hear and examine"; also, the words, "as provided in this act," after "presentation."

Stat. 1851, 468, was same as Stat. 1861, omitting therefrom all after the words, "oppose the application"; also, the word, "satisfactory."

7 Cal. 239; 20 Cal. 124, 313.

§ 1541. (§ 160.) The executor, administrator and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the probate judge, in the same manner and with like effect as in other cases.

Stat. 1851, 468, read: "The executor, or administrator, may be examined on oath and witnesses may be examined by either party, and process to compel their attendance, and testimony may be issued by the probate judge, in the same manner and with like effect as in other causes."

§ 1542. (§ 161.) If it appears necessary to sell a part of the real estate, and that by a sale thereof the residue of the estate, real *or personal*, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold, the court may authorize the sale of the whole estate, or of any part thereof necessary and for the best interest of all concerned.

Stat. 1865-6, 766, was substantially the same, adding the words, "and the court may confirm such sale of the whole estate or of a specific part thereof; *provided*, the necessity or expediency of such sale as already defined in this section, be set forth in the return of sale, and be established on the hearing; and the sale so confirmed shall be valid"; but omitted the words, "or personal."

Stat. 1861, 642, omitted the words, "or that after any such sale the residue would be so small in quantity or value, or would be of such a char-

acter with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold,"

Stat. 1851, 468, read: "If it shall appear to the court that it is necessary to sell a part of the real estate, and that by a sale of such part the residue of the estate, or some specific part or piece thereof, would be greatly injured, the court may authorize the sale of the whole estate, or of such part thereof as may be judged necessary, and most for the interests of all concerned."

29 Cal. 42.

§ 1543. (§ 162.) If the court is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this *article*, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition, as the court shall judge necessary or beneficial.

Stat. 1861, 642, read: "sections 155 and 161 of this act," instead of "this article."

Stat. 1851, 468, read: "probate judge," for "court"; also, for the payment of the allowance of the family and all valid claims against the deceased, and charges of the administration," instead of, "for any of the causes mentioned in this article."

20 Cal. 124; 21 Cal. 31; 33 Cal. 54, 665; 36 Cal. 690; 39 Cal. 184.

§ 1544. (§ 163.) The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or on a credit not exceeding one year, payable in gross or in installments, *and in such kind of money*, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor and administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order

and as directed therein, he may be compelled to sell, by order of the court, made on motion, after due notice, by any party interested.

Stat. 1861, 642, read: "that part descended to heirs," instead of, "the remainder"; also, "shall specify," instead of, "must describe"; and omitted the words, "and as directed therein."

Stat. 1851, 469, read: "The order shall specify the lands to be sold and the terms of sale, which may be either for cash or on a credit not exceeding six months, as the court may direct. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts, the Court shall order that part descended to heirs to be sold, before that so devised."

20 Cal. 124; 31 Cal. 606; 39 Cal. 184.

§ 1545. (§ 164.) If the executor or administrator neglects to apply for an order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator, before the hearing. The petition of such applicant must contain as many of the matters set forth in section fifteen hundred and thirty-seven as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale.

Stat. 1861, 642, inserted the words, "interested in the estate," between "person" and "may make."

Stat. 1851, 469, was same as Stat. 1861, omitting therefrom all after the words, "before the hearing."

§ 1546. (§ 165.) Upon making the order mentioned in the last section, a certified copy of the order of sale must be delivered by the court or the clerk to the executor or administrator, who is thereupon authorized and required to sell the real estate as directed.

Stat. 1861, 642.

Stat. 1851, 469, omitted the words, "or the clerk."

9 Cal. 196; 10 Cal. 119; 17 Cal. 344; 22 Cal. 274; 33 Cal. 50.

§ 1547. (§ 166.) When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before

the sale; the lands and tenements to be sold must be described with common certainty in the notice.

Stat. 1865-6, 766

Stat. 1851, 469, omitted the words, "and is to be made at public auction."

§ 1548. (§ 167.) Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or more counties it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

Vide § 1550 and note.

§ 1549. (§ 167.) When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county— if none, then in such paper as the court may direct—for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the probate court, to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen but not less that eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

Vide § 1550 and note.

§ 1550. (§ 167.) No sale of real estate at private sale shall be confirmed by the court, unless the sum offered is at lest ninety per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

Vide § 1543–9.

Stat. 1865–6, 766, substantially the same, adding the words, "as provided by law" to § 1548; also using the word, "and" for "or," before "may be filed," in § 1549; also, using the words, "of the inventory," for "of an estate," after "appraisement" in § 1550.

Stat. 1863–4, 370, read: "§ 16. Such sale shall be made in the county where the land is situated; but when the tract of land is situated in two or more counties it may be sold in either of said counties. The sale shall be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and shall be at public auction, unless the court shall have ordered that the real estate, or some part thereof, may be sold at either public or private sale; but the same shall not be sold at private sale until *at least one week after* notice of the terms of sale and of the time *not less than one week, within which offers or bids will be received*, shall have been given according to law as in case of sales at public auction; nor shall such sale at private sale be made unless the real estate to be sold shall have been appraised within a year previous to the time of such sale, nor shall the same be sold at private sale for any sum more than ten per cent. less than the appraised value thereof. If said real estate has not been so appraised, or if the court shall be satisfied that the appraisement is too high or too low, appraisers shall be appointed, and they shall make an appraisement thereof, in the same manner as in the case of the appraisement of the inventory.

Stat. 1861, 643 was same as Stat. 1863–4, omitting therefrom the words in italics.

Stat. 1851, 469, read: "such sale shall be in the county where the lands are situated, at public auction, between the hours of nine o'clock in the morning, and the setting of the sun the same day."

39 Cal. 307.

§ 1551. (§ 168.) The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money, with a mortgage on the property to secure their payment.

§ 1552. (§ 169.) The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the probate court, which must be filed in the office of the clerk, at any time subsequent to the sale, either in term or vacation. If the sale is made at public auction, and the return made

and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be had upon the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, or if made at public auction a hearing upon the return of proceedings be asked for in the return, or is brought on for a hearing upon a day before the first day of the next term thereafter, or upon any other day than the first day of the next term after such sale, the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer ten per cent. more in amount than that named in the return be made to the court in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.

Stat. 1863-4, 370, substantially the same, inserting the words, "and may examine," before "witnesses"; also "the court shall be of the opinion that," between "and if," and "the proceedings."

Stat. 1861, 643, read: "§ 169. The executor, or administrator, making any sale of any real estate, shall at the next term of the court thereafter, *or at any subsequent sitting of the court after making any such sale, upon notice of at least ten days, to be given in such manner as the court, or the judge may direct*, make a return of his proceedings to the probate court, who shall examine the same, and if the court shall be of the opinion that the proceedings were unfair, or the sum bid is disproportionate to the value, and that a sum exceeding such bid at least ten per cent. exclusive of the expenses of a new sale may be obtained, he shall vacate said sale, and direct another to be had, of which notice shall be given, and the sale shall be, in all respects, conducted as if no previous sale had taken place; *provided, that if an offer of ten per cent. or more, exclusive of the expenses of a new sale, be made to the court, in writing, by a responsible person, it shall be in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.*"

Stat. 1851, 469, same as Stat. 1861, omitting therefrom the words in Italics, and using "probate" judge for "probate court."

20 Cal. 125.

§ 1553. (§ 170.) When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections.

Stat. 1861, 644, read: "heard on said first day of the term subsequent to the sale, or any subsequent day to which the matter may be continued, or upon any day that may be fixed by the order of the court, or judge, and may produce witnesses in support of his objections," for the balance of the section after "and may be."

Stat. 1851, 469, read: "When the return of the sale is made, any person interested in the estate may file written objections to the confirmation of the sale, and may be heard and may produce witnesses in support of his objections."

9 Cal. 128.

§ 1554. (§ 171.) If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed, must be recorded in the office of the recorder of the county within which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a re-sale to be made of the property. If the amount realized on such re-sale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency *to the estate*.

Stat. 1861, 644, inserted the words, "or if disproportionate" between "sold" and "and that a greater sum"; also read, "advance" instead of "increased"; also, "order a new sale of the property sold to such purchaser," instead of, "order a re-sale to be made of the property."

Stat. 1856, 20, omitted the words, "or if the increased bid mentioned in section 1552 be made and accepted by the court"; also all after the words, "land sold is situated"; and read, "certified copy of the order authorizing the sale, and of the order confirming the same and directing conveyances to be executed," instead of "certified copy of the order

confirming it, and directing conveyances to be executed"; also inserted the words, "or if disproportionate" between "sold" and "and that a greater sum."

Stat. 1851, 470, omitted all after the words, "confirmed and valid"; also the words, "or if the increased bid mentioned in section 1552 be made and accepted by the court"; also inserted the words, "or if disproportionate," as *supra*.

9 Cal. 128, 197; 19 Cal, 410; 20 Cal. 124; 33 Cal. 54; 39 Cal. 184.

§ 1555. (§ 172.) Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume and page of the record, and such reference shall have the same effect as if the order were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest and estate of the decedent, in the premises, at the time of his death; if, *prior to the sale*, by operation of law or otherwise, the estate has acquired any right, title or interest, in the premises, other than or in addition to that of the decedent at the time of his death, such right, title or interest, also passes by such conveyances.

Stat. 1861, 644, read: "testator or intestate" instead of "estate," occurring after "property of the"; also, of such orders" instead of "the order of confirmation"; also, "testator or intestate" instead of "decedent."

Stat. 1856, 20, was same as stat. 1861, omitting therefrom all after the words, "time of his death"; also the words, "either by the date of such recording, or by the date and volume and page of such record."

Stat. 1851, 470, read; "Such conveyances shall thereupon be executed to the purchaser by the executor or administrators. They shall contain and set forth at large the original order authorizing a sale, and the order confirming the same, and directing the conveyance, and they shall be deemed to convey all the estate, rights and interest in the premises of the testator or intestate, and at the time of his death."

9 Cal. 128; 19 Cal. 410; 20 Cal. 126; 21 Cal. 44; 39 Cal. 184, 309.

§ 1556. (§ 173.) Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

19 Cal. 410; 20 Cal. 317; 33 Cal. 54.

§ 1557. (§ 174.) If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons

concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months.

§ 1558. (§ 175.) In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

Stat. 1861, 644, read: "adjournment" for "postponement."

Stat. 1851, 470, same substantially as stat. 1861, omitting therefrom, "by posting notices in three or more public places in the county where the land is situated."

§ 1559. (§ 176.) When a testator has given any legacy by will that is effectual to pass or charge the title to real estate, and his goods, chattels, rights and credits are insufficient to pay the legacy, together with his debts and the charges of administration, the executor or administrator with the will annexed may obtain an order therefor, and sell his real estate for that purpose, in the same manner and upon the same terms and conditions as are prescribed in this chapter in case of a sale for the payment of debts.

13 Cal. 596; 31 Cal. 606; 33 Cal. 667.

§ 1560. (§ 177.) If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration or family expenses, they must be paid according to such provision *or designation*, out of the estate thus appropriated, so far as the same is sufficient.

Stat. 1851, 470, read: "of the will," instead of "or designation," using "the" for "such."

31 Cal. 606.

§ 1561. (§ 178.) When such provision has been made, or any property directed by the will to be sold, the executor or administrator with the will annexed may sell without the order of the probate court, but he must give notice of the sale, return accounts thereof to the court, and make the sale in all respects as

under order of the court, unless there are special directions in the will, in which case he must be governed thereby.

Stat. 1861, 645, inserted the words, "whether for payment of debts or expenses, or for any other purpose," between "sold" and "the executor"; also read: "bound as an administrator to give," instead of "must give."

Stat. 1851, 470, substantially the same as § 1561.

1 Cal. 512; 13 Cal. 595; 15 Cal. 249; 18 Cal. 302; 39 Cal. 567; 31 Cal. 606, 32 Cal. 441.

§ 1562. (§ 179.) If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration and family expenses, that portion of the estate not *devised or* disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this *chapter*.

31 Cal. 607; 33 Cal. 667.

§ 1563. (§ 180.) The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate.

31 Cal. 607; 33 Cal. 667.

§ 1564. (§ 181.) When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the probate court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities and decree the amount each person shall contribute, *and reserve the same from their distributive shares respectively, for the purpose of paying such contribution.*

31 Cal. 607; 33 Cal. 667.

§ 1565. (§ 182.) If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if

he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seized, except as hereinafter provided.

§ 1566. (§ 183.) The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the probate judge until the purchasers execute a bond to the executor or administrator, for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the probate judge shall approve.

§ 1567. (§ 184.) The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled, against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract.

Stat. 1851, 471, added the words: "But if there be no payments thereafter to become due on such contract, no bond shall be required by the purchaser."

§ 1568. (§ 185.) Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract which vests in the purchaser, his heirs and assigns, all the right, title and interest *of the estate, or* of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

§ 1569. (§ 186.) When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, *and has been presented and allowed*, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, *if any*, in

due course of administration; the application of the purchase money to the satisfaction of the mortgage or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. *No claim against any estate which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate.* The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate court, to be received by the clerk thereof, where upon the mortgage or lien upon the land must cease, and the purchase money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs.

Stat. 1863, 698, was substantially the same; substituting for the words in italics commencing with "no claim," etc., the following: "*Provided*, however, that when it shall be shown to be necessary, the Court may direct that sufficient of such purchase money may be retained to meet such portion of the family allowance and charges and expenses of administration as may properly be required from the holder of such claim; such reservation of a portion of the purchase money shall not prevent the discharge of the mortgage or lien; and no lien against any estate shall be affected by the Statute of Limitations, pending the proceedings for the settlement of such estate"; and omitting the other italicized words.

Stat. 1861, 645, was same as stat. 1863, omitting all after the words, "settlement of such estate."

Stat. 1851, 472, read: "When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of land subject to any mortgage or lien, which is a valid claim against the estate of the deceased, the purchase money shall be applied after paying the necessary expenses of the sale, first to the payment and ratification of the mortgage, and the residue in due course of administration."

6 Cal. 376, 412; 9 Cal. 128; 18 Cal. 687; 21 Cal. 24; 24 Cal. 499; 27 Cal. 354; 29 Cal. 362; 32 Cal. 376.

Bank of Stockton v. Howland, Oct. T., 1871.

§ 1570. (§ 186.) At any sale, under order of the probate court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or

lien, he must pay to the court or the clerk thereof an amount sufficient to pay such expenses.

Vide § 1569 and note.
18 Cal. 687; 27 Cal. 354; 39 Cal. 308.

§ 1571. (§ 188.) If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise.

Stat. 1851, read; "a suit" instead of "an action"; also added as the case may require.

Stat. 1865-6, 824-5, read: "In all cases when real estate has been sold in this state under the order of the probate courts of the several counties to purchasers in good faith, for a valuable consideration, and defects of form, or omissions, or errors exist in any of the proceedings, such sales are hereby ratified, confirmed and made valid and sufficient in law to transfer the title of the property sold; *provided*, however, that this act shall not affect in any manner rights acquired prior to its passage, by vendees, grantees, or mortgagees, who claim interests in or liens upon such property under heirs or devisees adversely to such probate sales, nor to sanction in any manner cases of actual fraud."

§ 1572. (§ 189.) Any executor or administrator who fraudulently sells any real estate of a decedent contrary to *or otherwise than under* the provisions of this chapter, is liable in double the value of the land sold, as *liquidated* damages, to be recovered in an action by the person having an estate of inheritance therein.

20 Cal. 288; 29 Cal. 35.

§ 1573. (§ 190.) No action for the recovery of any estate, sold by an executor or administrator under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the sale. *An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other grounds upon which the action is based.*

20 Cal. 624; 33 Cal. 515. Harlan v. Miller, January Term, 1868. Meeks v. Kirby, January Term, 1872.

§ 1574. (§ 191.) The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may com-

mence an action at any time within three years after the removal of the disability.

Meeks v. Kirby, January Term, 1872.

§ 1575. (§ 192.) When a sale has been made by an executor or administrator, of any property of the estate, real or personal, he must return to the probate court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue or such revocation should not be made.

§ 1576. (§ 193.) No executor or administrator must directly or indirectly, purchase any property of the estate he represents, *nor must he be interested in any sale.*

29 Cal. 32.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

SECTION 1581. Executors to take possession of the entire estate.
1582. Executors may sue and be sued for recovery of property.
1583. May maintain actions for waste, conversion and trespass.
1584. Executor and administrator may be sued for waste or trespass of decedent.
1585. Surviving partner to settle up business. Interest therein to be appraised. Account to be rendered.
1586. Actions on bond of executor or administrator may be brought by another administrator.
1587. What executors are not parties to actions.
1588. May compound.
1589. Recovery of property fraudulently disposed of by testator.
1590. When executor to sue, as provided in preceding section.
1591. Disposition of estate recovered.

§ 1581. (§ 194.) The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent *or to the estate*. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, *for the purposes of administration, as provided in this title.*

Stat. 1861, 645, read: "for all other purposes," instead of closing words in italics.

Stat. 1851, 472, omitted all after the word, "decedent."

7 Cal. 238; 8 Cal, 580; 10 Cal. 119; 15 Cal. 259; 18 Cal. 458; 19 Cal. 87; 20 Cal. 163, 627; 26 Cal. 427; 28 Cal. 392; 29 Cal. 514; 31 Cal. 694; 38 Cal. 392; 39 Cal. 186. Chapman *v.* Hollister, October Term, 1871. Estate of M. Gasq. October Term, 1871. Meeks *v.* Kirby, January Term, 1872.

§ 1582. (§ 195.) Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

6 Cal. 167; 8 Cal. 580; 14 Cal. 119; 18 Cal. 459; 19 Cal. 87, 117; 20 Cal. 163, 627; 31 Cal. 570.

§ 1583. (§ 196.) Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime.

8 Cal. 580; 14 Cal. 252; 16 Cal. 579; 19 Cal. 117, 123.

§ 1584. (§ 197.) Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

7 Cal. 348; 8 Cal. 580; 9 Cal. 130; 23 Cal. 568.

§ 1585. (§ 198.) When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the probate judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the ex-

ecutor or administrator may maintain against him any action which the decedent could have maintained.

9 Cal. 636; 16 Cal. 118; 34 Cal. 263; 38 Cal. 392. Griggs, Administrator, v. Clark, April Term, 1861.

§ 1586. (§ 199.) An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

§ 1587. (§ 200.) In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but who have not qualified.

§ 1588. (§ 201.) Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the probate court or judge, may compound with him, and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized, when it appears to be just and for the best interest of the estate.

Stat. 1861, 645.
Stat. 1851, 473, omitted all after the word, "effects."

§ 1589. (§ 202.) When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

Stat. 1851, 473, read: "may, and it shall be his duty to commence and prosecute," instead of, "must commence and prosecute."

§ 1590. (§ 203.) No executor or administrator is bound to sue for such estate as mentioned in the preceding section, for the

benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the probate judge shall direct.

Stat. 1851, 474, read: "nor unless the creditors making the application," instead of, "who."

§ 1591. (§ 204.) All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the probate court; and the proceeds of all goods, chattels, rights and credits so recovered must be appropriated in payment of the debts of the decedent, in the same manner as other property in the hands of the executor or administrator.

CHAPTER IX.

OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

SECTION 1597. Executor to complete contracts for sale of real estate.
1598. Petition for executor to make conveyance, and notice of hearing.
1599. Interested parties may contest.
1600. Conveyances, when ordered to be made.
1601. Execution of conveyance and record thereof, how enforced.
1602. Rights of petitioner to enforce contract.
1603. Effect of conveyance.
1604. Effect of recording a copy of the decree.
1605. Recording decree does not supersede power of court to enforce it.
1606. Where party to whom conveyance to be made is dead.
1607. Decree may direct possession to be surrendered.

§ 1597. (§ 205.) When a person who is bound by contract, in writing, to convey any real estate, dies before making the conveyance, and in all cases where such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

28 Cal. 46.

§ 1598. (§ 206.) On the presentation of a *verified* petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the probate court must appoint a time and place for hearing the petition, at a regular term of the court; and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this state as he may designate.

Stat. 1851, 474, read: "notice of the pendency thereof, and the time and place of hearing," instead of, "notice thereof."

19 Cal. 162.

§ 1599. (§ 207.) At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon *satisfactory* proof by affidavit or otherwise of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose.

Stat. 1861, 646, read: "adjourned," instead of, "postponed."

Stat. 1851, omitted "or otherwise"; also, read: "defend," instead of, "contest."

§ 1600. (§ 208.) If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, *entered on the minutes of the court and recorded.*

Stat. 1861, 646.

Stat. 1851, 474, read: "probate judge" instead of, "court."

§ 1601. (§ 209.) The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the recorder of the county where the lands lie, and shall be *primary* evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance.

Stat. 1861, 646.

Stat. 1851, 475, prefixed to the section the words, "Any person interested may appeal from such decree to the district court for the same county, as in other cases; but, if no appeal be taken from such decree, within the time limited therefor by law, or if such decree be affirmed on appeal."

§ 1602. (§ 210.) If, upon hearing in the probate court, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of

the petitioner, who may, at any time within six months thereafter, proceed, in the district court, to enforce a specific performance thereof.

Stat. 1861, 646.
Stat. 1851, 475, read "probate judge," instead of "court."

§ 1603. (§ 211.) Every conveyance made in pursuance of a decree of the probate court, as provided in this chapter, shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance.

13 Cal. 595; 20 Cal. 381; 21 Cal. 44; 31 Cal. 613; 35 Cal. 353.

§ 1604. (§ 212.) A copy of the decree for a conveyance, made by the probate court, and duly certified and recorded in the office of the recorder of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree.

§ 1605. (§ 213.) The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

§ 1606. (§ 214.) If the person entitled to the conveyance dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

Stat 1851, 475, same in substance, inserting the words, "the estate under him, as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract," instead of, "succeed to his rights in the contract."

§ 1607. (§ 214.) The decree provided for in this chapter may direct the possession of the property therein described to be

surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered.

CHAPTER X.

OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

ARTICLE I LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.
II. ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.
III. THE PAYMENT OF DEBTS OF THE ESTATE.

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

SECTION 1612. When executor or administrator personally liable
1613. Executor to be charged with all estate, etc.
1614. Not to profit or lose by estate.
1615. Uncollected debts without fault.
1616. Compensation of the executor and administrator.
1617. Not to purchase claims against the estate.
1618. Executor's and administrator's commissions.

§ 1612. (§ 215.) No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

§ 1613. (§ 216.) Every executor or administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate.

6 Cal. 606; 37 Cal. 431.

§ 1614. (§ 217.) He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

12 Cal. 200; 26 Cal. 61, 429; 37 Cal. 431; 39 Cal. 188, 601.

§ 1615. (§ 218.) No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

§ 1616. (§ 219.) He shall be allowed all necessary expenses, in the care, management and settlement of the estate, and for his services such fees *as provided in this chapter*; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the probate court, he renounces all claim for compensation provided by the will.

Stat. 1851, 476, read: "as the law provides," instead of, "as provided in this chapter."

6 Cal. 167; 10 Cal. 558; 24 Cal. 92; 38 Cal. 87. Estate of M. Gasq. October Term, 1871. Estate of Simmons, July Term, 1871.

§ 1617. (§ 220.) No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid.

9 Cal. 636; 21 Cal. 32; 26 Cal. 57.

§ 1618. (§ 221.) When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the whole estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent.; for all above that sum, at the rate of four per cent.; and the same commission must be allowed administrators. In all cases, such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total

amount of such allowance must not exceed the amount of commissions allowed by this section.

Stat. 1861, 646.

Stat. 1851, 476, inserted the words, "not required by an executor or administrator in the common course of his duty," between "extraordinary services" and "the total."

13 Cal. 144; 24 Cal. 93; 30 Cal. 113.

§ 1616. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, *including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in the probate or other courts*, and for his services, such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensatoin of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the probate court, he renounces all claim for compensation provided by the will. (Approved March 24, 1874. In effect May 23, 1874.)

§ 1618. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the whole estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum, and not exceeding ten thousand dollars, at the rate of five per cent.; for all above that sum at the rate of four per cent.; and the same commission must be allowed administrators. In all cases, such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section; *and that public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators.* (Approved 24th March, 1874. In effect May 23, 1874.)

ARTICLE II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

SECTION 1622. To render an exhibit of receipts and disbursements, and claims allowed.
1623. Citation to account at third term.
1624. Petition for citation to render final or other account.
1625. Citation to account on application.
1626. Objections to account, who may file.
1627. Attachment for not obeying citation.
1628. To render accounts at expiration of term.
1629. Executor to account after his authority revoked.
1630. Revoking authority of executor, when.
1631. To produce and file vouchers, which remain in court.
1632. Vouchers for items less than twenty dollars, when excepted.
1633. Day of settlement to be appointed, and must give notice thereof.
1634. Final settlement, partition and distribution may be made at same time. Postponing order is notice.
1635. Interested party may file exceptions to account.
1636. All matters may be contested by the heirs. Hearing may be postponed.
1637. Settlement of accounts to be conclusive, when and when not.
1638. Proof of notice of settlement of accounts.

§ 1622. (§ 222.) At the third term of the court after his appointment, and thereafter at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs.

3 Cal. 289; 9 Cal. 636; 23 Cal. 363; 24 Cal. 93; 26 Cal. 427.

§ 1623. (§ 223.) If the executor or administrator fails to render an exhibit at the third term of the court, the judge of the probate court must cause a citation to be issued requiring him to appear and render it.

§ 1624. (§ 224.) Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the probate judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

§ 1625. (§ 225.) If the judge is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear at some day to be named in the citation, which must be during a term of the court, and render an exhibit as prayed for.

§ 1626. (§ 226.) When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled or mismanaged the estate, his letters must be revoked.

11 Cal. 213; 26 Cal. 57; 29 Cal. 516.

§ 1627. (§ 227.) If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him *and such exhibit enforced*, or his letters may be revoked, in the discretion of the court.

26 Cal. 429,

§ 1628. (§ 228.) Every executor or administrator must render a full account and a report of his administration at the expiration of one year from the time of his appointment. If he fails to present his account, the court or judge must compel the rendering of the account by attachment, and any person interested

in the estate may apply for and obtain an attachment, but no attachment must issue unless a citation has been first issued, *served* and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account rendered must exhibit not only the debts which have been paid, but also a statement of all debts which have been duly presented and allowed during the period embraced in the account.

Stat. 1861, 647.
Stat. 1851, 477, omitted the word, "served"; also, all after the words, "should not issue."
9 Cal 636; 26 Cal. 429; 30 Cal. 110; 37 Cal. 426.

§ 1629. (§ 229.) When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the probate court at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.

9 Cal. 636.

§ 1630. (§ 230.) If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

9 Cal. 636.

§ 1631. (§ 231.) In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

Stat. 1861, 647.
Stat. 1851, 478, omitted all after, "disposition thereof."
9 Cal. 636; 37 Cal. 426.

§ 1632. (§ 232.) On the settlement of his account he may be allowed any item of expenditure, not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate.

9 Cal. 636; 37 Cal. 425.

§ 1633. (§ 233.) When any account is rendered for settlement, the court or judge must appoint a day for the settlement thereof; the clerk must thereupon give notice thereof, by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court or probate judge may order such further notice to be given as may be proper.

Stat. 1861, 647.

Stat. 1851, 478, omitted the last sentence; also the words, "the court or judge must appoint a day for the settlement thereof."

9 Cal. 636; 30 Cal. 110.

§ 1634. (N. S.) If the account mentioned in the preceding section is for a final settlement, and the estate is ready for distribution and partition, the notice thereof required to be published, must state these facts; and, on confirmation of the final account, distribution and partition of the estate to all entitled thereto must be immediately had, without further notice or proceedings. If, from any cause, the hearing of the account or the partition and distribution is postponed, the order postponing the same to a day certain is notice to all persons interested therein.

§ 1635. (§ 234.) On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

9 Cal. 636; 26 Cal. 57; 29 Cal. 519; 30 Cal. 110.

§ 1636. (§§ 235, 236.) All matters, including allowed claims not passed upon on the settlement of any former account, or on

rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

Stat. 1861, 647, prefixed to the section the words: "If there be any minor interested in the estate, who has no legally appointed guardian, the court shall appoint some disinterested person to represent him, who, on behalf of the minor, may contest the account, as any other person having an interest might contest it, and who shall be allowed by the court, for his services, a reasonable compensation; *the court shall also, if it deems it necessary, appoint an attorney to represent the absent heirs and devisees.*"

Stat. 1851, 478, prefixed the same words as stat. 1861, omitting those in italics; also used the word "auditor" instead of "referees."

9 Cal. 636; 30 Cal. 110; 37 Cal. 426.

§ 1637. (§ 237.) The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities cease, and in any action brought by any such person, the allowance and settlement of the account is primary evidence of its correctness.

Stat. 1851, 478, read: "presumptive" instead of "primary."

9 Cal. 636; 11 Cal. 212; 24 Cal. 94; 30 Cal. 111; 36 Cal. 654; 37 Cal 426.

§ 1638. (§ 238.) The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact.

9 Cal. 636; 30 Cal. 111.

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

SECTION 1643. Order in which debts to be paid.
1644. Where property insufficient to pay mortgage
1645. Estate insufficient, a dividend to be paid.
1646. Funeral expenses and expenses of last sickness.
1647. Order for payment of debts and discharge of the executor and administrator.
1648. Provision for disputed and contingent claims.
1649. After decree for payment of debts, executor personally liable to creditors.
1650. Claims not included in order for payment of debts, how disposed of.
1651. Order for payment of legacies and extension of time.
1652. Final account, when to be made.
1653. Neglect to render final account, how treated.

§ 1643. (§ 239.) The debts of the estate, *subject to the provisions of section twelve hundred and five*, must be paid in the following order:

1. Funeral expenses.
2. The expenses of the last sickness.
3. Debts having preference by the laws of the United States.
4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date.
5. All other demands against the estate.

9 Cal. 636; 12 Cal. 208; 26 Cal. 66; 29 Cal. 362.

§ 1644. (§ 240.) The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

9 Cal. 636.

§ 1645. (§ 241.) If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall re-

ceive any payment until all those of the preceding class are fully paid.

9 Cal. 636; 18 Cal. 431; 26 Cal. 66

§ 1646. (§ 242.) The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this *article*, the payment has been ordered by the court.

9 Cal. 636; 18 Cal. 431; 37 Cal. 428.

§ 1647. (§ 243.) Upon the settlement of the accounts of the executor or administrator at the end of the year, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there is not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge, on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court.

Stat. 1861, 643.

Stat. 1851, 479, omitted all after the words, "each creditor."

9 Cal. 636; 14 Cal. 129; 18 Cal. 431; 26 Cal. 57, 431; 30 Cal. 111; 32 Cal. 127; 37 Cal. 426; 39 Cal. 70, 184.

§ 1648. (§ 244.) If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled

to be paid accordingly. *The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.*

9 Cal. 636; 18 Cal. 429.

§ 1649. (§ 245.) When a decree is made by the probate court for the payment of creditors, the executor or administrator is personally liable to each creditor for his *allowed* claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the district court, in favor of each creditor, and the same proceeding may be had under such execution as if it had been issued from the district court. The executor or administrator is liable therefor on his bond to each creditor.

14 Cal. 130; 26 Cal. 431.

§ 1650. (§ 246.) When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section fourteen hundred and ninety-one, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day.

Stat. 1851, 480, read: "by this act," instead of, "in section fourteen hundred and ninety-one." 9 Cal. 636.

§ 1651. (§ 247.) If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give

such extension of time as may be reasonable, for a final settlement of the estate.

Stat. 1861, 648.

Stat. 1851, 480, omitted the words, "as provided in the next chapter"; also the words, "or if, for other reasons, the estate be not in a proper condition to be closed." 9 Cal. 636; 30 Cal. 111.

§ 1652. (§ 248.) At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account and pray a settlement of his administration.

Stat. 1861. 648.

Stat. 1851, 480, omitted the words, "in the last section"; also, "and the estate be in a proper condition to be closed."

9 Cal. 636; 30 Cal. 111.

§ 1653. (§ 249.) If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him, and all the provisions of this chapter relative to the last mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

9 Cal. 636; 30 Cal. 111.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION AND FINAL SETTLEMENT OF ESTATES.

ARTICLE I. PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.
II. DISTRIBUTION ON FINAL SETTLEMENT.
III. DISTRIBUTION AND PARTITION.
IV. AGENTS FOR ABSENT INTERESTED PARTIES, DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

SECTION 1658. Payment of legacies upon giving bonds.
1659. Notice of application for legacies.
1660. Executor or other person may resist application.
1661. Decree prayed for to require bond, which must be given. May order whole or part of share to be delivered. Where partition necessary, how made. Costs.
1662. Order for payment of bond, and suit thereon.

§ 1658. (§ 250.) At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

Stat. 1861, 648.

Stat. 1851, 430, read: "at any time subsequent to the third term of the probate court," instead of, "at any time after the lapse of four months."

14 Cal. 112; 31 Cal. 619.

§ 1659. (§ 251.) Notice of the application must be given to the executor or administrator, personally, and to all persons in-

terested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Stat. 1861, 648.

Stat. 1851, 480, omitted the word, "personally." 31 Cal. 619.

§ 1660. (§ 252.) The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee or legatee may make a similar application for himself.

31 Cal. 619

§ 1661. (§§ 253, 254, 255, 256.) If, at the hearing, it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring—

1. Each heir, legatee or devisee obtaining such order, before receiving his share or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the probate judge, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, *not exceeding the value or amount of the legacy or portion of the estate to which he is entitled.*

2. The executor or administrator to deliver to the heir, legatee or devisee the whole portion of the estate to which he may be entitled, or only a part thereof, *designating it.*

If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings to be paid by the applicant, or if there be more than one, to be apportioned equally amongst them.

Stat 1851, 481, was substantially the same, inserting in § 253 thereof, (which corresponds with the above down to and including subdivision 1) the words, "or parties," after "party"; "or them," after "to him"; "injury," instead of, "loss"; "or applicants," after "applicant."

14 Cal. 112; 20 Cal. 628; 31 Cal. 619.

§ 1662. (§ 257.) When any bond has been executed and delivered under the provisions of the preceding sections, and it is

necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

31 Cal. 619.

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

SECTION 1665. Distribution of estate, how made and to whom.
1666. What the decree must contain, and is final.
1667. Distribution when decedent was not a resident of this state.
1668. Decree to be made only after notice.
1669. No distribution to be ordered till all taxes on personal property are paid.

§ 1665. (§ 258.) Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate *in the hands of the executor or administrator*, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court, and included in the *order or* decree; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

Stat. 1865-6, 329, read: "shall have left him or her surviving several children, or one child and the issue of one or more other children, and if any one of such surviving children shall," instead of, "has left a surviving child, and the issue of other children, and any of them"; also, "heirs as prescribed by law," instead of, "heirs at law"; also inserted "be

words, "unless distribution of the real estate only be made," between "distribution," and "and a settlement."

Stat. 1861, 649, omitted all the words between, "are entitled" and "A statement"; also inserted the words, "or the grantee of the heir, legatee or devisee," after the words, "or devisee."

Stat. 1851, 431, omitted all after the words, "are entitled."

6 Cal. 418; 20 Cal. 628; 33 Cal. 665; 40 Cal, 465; Estate of Ryberg, January Term, 1871.

Vide § 1667.

Stat. 1865–6, 767–8, §§ 10–12, was substantially the same as this and the following section, inserting after the word "appeal" the words, "in the manner and within the time provided by law"; also the words, "or place," after "allowed in the state," in § 1667.

Stat. 1851, 481, omitted § 1667; also all of § 1666, after the words, "same in possession."

§ 1666. (§ 259.) In the *order or* decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, *sue for* and recover their respective shares from the executor or administrator, or any person having the same in possession. Such *order or* decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal.

20 Cal. 628; 40 Cal. 453.

§ 1667. (§ 259.) Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate ordered by virtue of this section must be made in the same manner as other sales of real estate of decedents by order of the probate court.

Vide § 1666 and note.

§ 1668. (§ 260.) The *order or* decree may be made on the petition of the executor or administrator, or of any person interested in the estate, but notice must be given, or waived, *unless distribution is made, or the time for making it is fixed by order of the court, at the time of the settlement of the final account.* All proceedings *not so waived or dispensed with* must be had in the manner provided in article four, chapter seven, of this title, for sale of real estate by an executor or administrator. The court may order such further notice to be given as it may deem proper. If partition is applied for, as provided in this chapter, such decree shall not divest the court of jurisdiction for the purposes of partition, unless the estate is finally closed.

Vide § 1669.

Stat. 1861, 649, substantially the same, omitting of course the italicized words.

Stat. 1851, 482, read: "The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The court may order such further notice to be given as it may deem proper."

Estate of Ryberg, Jan. T., 1871; Estate of Silvey, Oct T., 1871.

§ 1669. (§ 260.) Before any decree of distribution of an estate is made, the probate court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

Vide § 1668 and note.

Stat. 1865–6, 521, § 5, read: "No order or decree for the distribution of any property of any decedent shall be made by the probate judge, until the administrator or administrators, executor or executors, executrix or executrices, (as the case may be) shall have filed in the probate court his, or her, or their good and sufficient affidavit that all personal property taxes due the state, and said city and county, that have attached to or accrued against the estate of such decedents, have been fully paid." (This Act was to facilitate the collection of taxes in San Francisco.)

Stat. 1857, 335, § 28, read: "It is hereby made the duty of every probate court and probate judge, from time to time, to direct each and every executor and administrator, (which directions may be either specifically given in each case or by a general order) to pay out of the funds of the estate all taxes that have attached to or accrued against such estate after the passage of this Act, and no order or decree for the distribution of any property of any decedent among the heirs or devisees shall be made until all taxes that have attached to or accrued against the estate shall have been paid."

Stat. of U. S. required Internal Revenue stamp of $1 when the estate, as sworn to, does not exceed $2,000 in value, and for every thousand dollars, or fractional part thereof, in excess of $2,000, 50 cents.

No Internal Revenue stamp is required on estates, where the effects, real and personal, do not exceed $1,000 in value.

No stamp is necessary upon papers used in the collection of claims from the U. S. Government by soldiers or their legal representatives, for pensions, back pay, bounty, or for property lost in the service.

Vide Act June 30th, 1864, U. S. Statutes at Large. Vol. 13, pp. 285 *et seq.* for provisions concerning U. S. Int. Rev. Taxes upon legacies and distributions.

Repealed?

ARTICLE III.

DISTRIBUTION AND PARTITION.

SECTION 1675. Estate in common. Commissioners.
1676. Partition and notice thereof, and the time of filing petition.
1677. Estate in different counties, how divided.
1678. Partition may be made although some of the heirs, etc., have parted with their interest.
1679. Shares to be set out by metes and bounds.
1680. Whole estate may be assigned to one, in certain cases.
1681. Payments for equality of partition, by whom and how.
1682. Estate may be sold.
1683. To give notice to all persons and guardians before partition. Duties of commissioners.
1684. To make report, and partition to be recorded.
1685. When commissioners to make partition are not necessary.
1686. Advancements made to heirs.

§ 1675. (§ 261.) When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition *or distribution* may be made by three disinterested persons, to be appointed commissioners for that purpose by the probate court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the *order or* decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed.

Stat. 1861, 649, inserted the words, "or when property of the estate shall be held in common and undivided with other parties," between "distinguished" and "partition"; also, "by any officer authorized to administer oaths," between "duties" and "a certified copy."

Stat. 1851, 492. omitted all after the words, "duties"; also the words, "by the decree of distribution"; also read, "probate judge" instead of "probate court or judge"; also added after the word "duties," the words, "and the court shall issue a warrant to them for that purpose."

§ 1676. (§ 263.) Such partition may be ordered *and had in the probate court* on the petition of any person interested. But before commissioners are appointed, or partition ordered *by the probate court* as directed in this chapter, notice thereof must be given to all persons interested, who reside in this state, or to their guardians, and to the agents, attorneys or guardians, if any in this state, of such as reside out of the state, either personally or by public notice, as the probate court may direct. The petition may be filed, attorneys, guardians and agents appointed, and notice given, at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate.

Stat. 1861, 640, read: "assigning instead of distributing"; and added the words, "but when the application is made solely to have partition between the estate administered upon, and any other parties, such application may be made, and such partition ordered, at any time the court may direct"; otherwise it was substantially the same.

Stat. 1851, 482, omitted all after the words, "may direct"; also the words, "commissioners are appointed, or"; also, the words in italics.

§ 1677. (§ 262.) If the real estate is in different counties, the probate court may, if deemed proper, appoint a commissioner *for all*, or different commissioners for each county. The estate in each county must be divided separately *among the heirs, devisees or legatees*, as if there was no other estate to be divided; but the commissioner first appointed must, unless otherwise directed by the probate court, make division of such real estate, wherever situated within this state.

Stat. 1861, 649.

§ 1678. (§ 264.) Partition *or distribution* of the real estate may be made as provided in this chapter, although some of the original heirs, *legatees* or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, *legatees* or devisees

Stat. 1851, 482, substantially the same.
18 Cal. 99.

§ 1679. (§ 265.) *When both distribution and partition are made*, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

§ 1680. (§ 266.) When the real estate cannot be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to share therein who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by *the* commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. *On filing* the report of the commissioners, and on making or securing the payment as before provided for, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and *the title to* the whole of such real estate vests in the person to whom the same is so assigned.

Stat. 1863–4, 371, read: "upon the return of," instead of "on filing."

Stat. 1861, 650, omitted all after the words, "by the commissioners."

Stat. 1851, 482, was the same as stat. 1861, omitting therefrom the words, "or in case of the minority of such party then to the satisfaction of his or her guardian"; also inserting, "by commissioners appointed by the probate court and sworn for that purpose," instead of "and reported by the commissioners."

§ 1681. (§ 267.) When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of

the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

§ 1682. (§ 268.) When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported and confirmed, in the same manner and under the same requirements provided in article four, chapter seven, of this title.

Stat. 1861, 650, read: "When it cannot otherwise be fairly divided, the whole, or any part of the estate, real or personal, may be recommended by the commissioners to be sold; and if the report be confirmed, the court may order a sale by the executor or administrator, or by a commissioner appointed for that purpose, and distribute the proceeds. The sale shall be conducted and reported upon, and be confirmed, in the same manner and under the same rules as in ordinary cases of sales of land by an administrator under this act.

Stat. 1851, 433, same as stat. 1861, omitting all after the words, "the proceeds"; also reading "agent appointed" instead of "commissioner appointed."

§ 1683. (§ 270.) Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents or attorneys, by the commissioners, of the time and place, when and where, they shall proceed to make partition. The commissioners may take testimony, order surveys and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

Stat. 1861, 651, inserted the words: "Guardians shall be appointed for all minors and insane persons interested in the estate to be divided; and some discreet person shall be appointed to act as agent for such parties as reside out of the state, or an attorney for all absent heirs and persons interested," between "chapter" and "notice."

Stat. 1851, 433, read: "Before every partition shall be made, or any estate divided, as provided in this chapter, guardians shall be appointed for all minors and insane persons interested in the estate to be divided; and some discreet person shall be appointed to act as agent for such par-

ties as reside out of the state; and notice of the appointment of such agent shall be given to the commissioners in their warrant; and notice shall be given to all persons interested in the partition, their guardians or agents, by the commissioners, of the time when they shall proceed to make partition."

§ 1684. (§ 271.) The commissioners must report their proceedings, and the partition agreed upon by them, to the probate court, in writing, and the court may for sufficient reasons, set aside the report and commit the same to the same commissioners or appoint others; and when such report is finally confirmed, a certified copy of the *judgment or* decree of partition made thereon, attested by the clerk, under the seal of the court, must be recorded in the office of the recorder of the county where the lands lie.

Stat. 1861, 651.

Stat. 1851, 483, read: "The commissioners shall make report of their proceedings to the probate court in writing, and the court may for sufficient reasons set aside such report, and remit the same to the same commissioners, or appoint others; and the report, when finally accepted and established, shall be recorded in the records of the probate court, and a copy thereof, attested by the clerk under the seal of the court, shall be recorded in the office of the recorder of the county where the lands lie."

§ 1685. (§ 272.) When the probate court makes *judgment or* decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made.

§ 1686. (§ 273.) All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the probate court, and must be specified in the decree assigning and distributing the estate; and the final *judgment or* decree of the probate court, or in case of appeal, of the supreme court, is binding on all parties interested in the estate

Stat. 1861, 651, read "any heirs" for "his heirs."

Stat. 1851, 483, read same as stat. 1861, down to and including "decree assigning," and thereafter as follows: "the estate, and in the warrant to the commissioners, and the final decree of the probate court, or in case of appeal, of the district or supreme court, shall be binding on all parties interested in the estate."

ARTICLE IV.

AGENTS FOR ABSENT INTERESTED PARTIES, DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

SECTION 1691. Court may appoint agent to take possession for absentees.
1692. Agent to give bond, and his compensation.
1693. Unclaimed estate, how disposed of.
1694. When real and personal property of absentee to be sold.
1695. Liability of agent on his bond.
1696. Certificate to claimant.
1697. Final settlement, decree and discharge.
1698. Discovery of property.

§ 1691. (§ 274.) When any estate is assigned *or distributed* by a *judgment or* decree of the court, as provided in this chapter, to any person residing out of, and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absent person in the distribution.

§ 1692. (§ 275.) The gaent must *first* give a bond to the probate judge, to be approved by him, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

Stat. 1851, 484, substantially the same, inserting the words, "before he shall be authorized to receive the same," between "estate" and "the court."

§ 1693. (§ 276.) When *personal property* remains in the hands of the agent unclaimed for a year, *and it appears to the court that it is for the benefit of those interested,* it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the state treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the controller, and the other in the probate court.

§ 1694. (N. S.) The agent must render to the probate court appointing him, annually, an account, showing—

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.

2. The income derived therefrom.

3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.

4. Expenses incurred in the care, protection and management thereof, and whether paid or unpaid.

When filed, the probate court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the state treasury.

§ 1695. (§ 277.) The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

Stat. 1851, 484, read: "when the estate," instead of "when personal property."

§ 1696. (§ 278.) When any person appears and claims the money paid into the treasury, the probate court making the distribution *must inquire into such claim and* being first satisfied of his right *thereto*, must grant him a certificate *to that effect*, under its seal; and upon the presentation of the certificate to him, the controller must draw his warrant on the treasurer for the amount.

§ 1697. (§ 279.) When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must

make a *judgment or* decree discharging him from all liability to be incurred thereafter.

Stat. 1861, 651.

Stat. 1851, 484, omitted the words "and performed all the acts lawfully required of him."

24 Cal. 501; 36 Cal. 654.

§ 1698. (§ 280.) The final settlement of an estate does not prevent the subsequent issuance of letters testamentary, or of administration with the will annexed, whenever other property of the estate is discovered, or whenever it becomes necessary or proper, from any cause, that letters should be again issued.

Stat. 1861, 651, same in substance.

Stat. 1851, 484, same in substance, inserting the word "subsequently" before "discovered," and omitting the words "testamentary, or of"; also "with the will annexed."

[Amendment approved February 13, 1872—took effect immediately. § 280. The final settlement of an estate shall not prevent a subsequent issuance of letters testamentary with the will annexed, or of subsequent letters of administration, when no will exists, should other property of the estate be discovered, or should it become necessary or proper, from any cause, that letters should be again issued.]

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS AND APPEALS.

SECTION 1704. Orders and decrees to be entered in minutes.
1705. How often publication to be made.
1706. Recorded decree or order to impart notice from date of filing.
1707. Citation, how directed and what to contain.
1708. Citation, how issued.
1709. Citation, how served.
1710. Personal notice given by citation.
1711. Citation to be served five days before return.
1712. One description of real estate sought to be sold being published, is sufficient for all purposes.
1713. Rules of practice generally.
1714. New trials and appeals.
1715. Within what time appeal must be taken.
1716. Issues joined in probate court, how tried and disposed of.
1717. Court to try case when no jury is demanded. How and what issues to be tried.
1718. Court to appoint attorney for minor or absent heirs, devisees, legatees or creditors, when, and what compensation he is to receive.
1719. Decree relative to homestead, and effect thereof.
1720. Costs, by whom paid in certain cases.
1721. Executor, administrator or guardian to be removed when committed for contempt, and another appointed.

§ 1704. (§ 287.) All orders and decrees made by the probate court during its terms, and all orders which the probate judge is specially authorized to make out of term time *pr at, chambers*, must be entered at length in the minute book of the court. Upon the close of each term the judge must sign the minutes.

Stat. 1861, 652, read: "empowered" instead of "authorized;" also added the words, "of the proceedings, when any publication is ordered, such publication shall be made daily or otherwise, as often during the

prescribed period as the paper is regularly issued, unless otherwise provided in this act. The court or judge may, however, prescribe a less number of publications during the period prescribed."

Stat. 1851, 485, read: "All orders and decrees made by the probate court, during its terms, shall be entered at length in the minute-book of the court; and also all orders which the probate judge is empowered to make out of term-time, and which are, by this act, specially required to be so entered. Upon the close of each term, the judge shall sign the minutes of the proceedings."

§ 1705. (§ 287.) When any publication is ordered, such publication must be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court or judge may, however, order a less number of publications during the period.

Vide § 1704, and note.

§ 1706. When it is provided in this title that any order or decree of a probate court or judge, or a copy thereof, must be recorded in the office of the county recorder, from the time of filing the same for record, notice is imparted to all persons of the contents thereof.

Stat. 1865–6, 767, § 11, was substantially the same; but read "by law" instead of "in this title"; also added the words, "provided, that nothing in this section shall be construed to lessen in any respect the force or effect, as notice or otherwise, of any order, decree, act or proceeding of a probate court or probate judge."

§ 1707. Citations must be directed to the person to be cited, signed by the clerk and issued under the seal of the court, and must contain—

1. The title of the proceeding.
2. A brief statement of the nature of the proceeding.
3. A direction that the person cited appear at a time and place specified.

§ 1708. The citation may be issued by the clerk upon the application of any party without an order of the judge, except in cases in which such order is by the provisions of this title expressly required.

§ 1709. The citation must be served in the same manner as a summons in a civil action.

§ 1710. When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation.

§ 1711. (§ 290.) When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof.

§ 1712. (N. S.) When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale or notice of a petition for the confirmation thereof; it is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

§ 1713. (§ 293.) Except as otherwise provided in this title, the provisions of Part II of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

§ 1714. The provisions of Part II of this code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title.

As to appeals from probate court, §§ 969–971.

§ 1715. The appeal must be taken within sixty days after the order, decree or judgment is entered.

§ 1716. (§ 294.) All issues of fact joined in the probate court must be tried in conformity with the requirements of article two, chapter two, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issues joined, as well as for costs, may be entered and enforced by execution or otherwise, by the probate court, as in civil actions.

Vide § 1717.

Stat. 1867-8, 629, read: "All issues of fact found in the probate court shall be subject to the provisions of section twenty of this act, as to the mode of joining such issues, and of disposing of the same. Upon filing the ground of opposition, and after a written request for a trial by jury is filed, the court or judge, on due notice to the opposite party or parties, shall settle and frame the issue or issues between the parties, and direct a trial to be had by a jury, if a jury be demanded; and such trial shall be

had and verdict rendered upon such issues, and the judgment or decree of the probate court shall thereupon be made upon the verdict rendered, the same as if such issues had been found and determined by the probate court; *provided*, that exceptions may be taken for failure or refusal of the probate court or judge to submit to the jury all material issues involved in the contest, and presented in writing, in the written opposition; and either party shall be entitled to move for a new trial and to appeal, for or on account of error committed by the probate court in settling the issues of fact to be submitted to the jury, or for errors occurring at the trial of such issues or in rendering judgment, as in other civil actions."

Stat. 1861, 653, read: "All issues of fact joined in the probate court, shall be subject to the provisions of section twenty of this act, as to the mode of joining such issues, and of disposing of the same. Upon filing the grounds of opposition, and after a written request for a trial by jury be filed, the court, or judge, on due notice to the opposite party, or parties, shall settle and frame the issues between the parties, and direct the trial to be had in the district court. A record shall thereupon be made up in the probate court, consisting of the issues framed, the order certifying them to the district court, and such other papers, or documents, from the files, or copies of the same, and copies of orders, or other matters of record, as may be necessary, which shall be certified by the clerk and transmitted to the district court. After the trial and verdict, a statement of the proceedings had in the district court shall be made up and certified by the clerk, which shall be transmitted to the probate court, together with the original papers and documents sent from the probate court; the decree of the probate court shall thereupon be made upon the verdict rendered, the same as if such determination of said issues had been made by the probate court. All questions of costs may be determined by the probate court, and execution may issue in accordance with the order of the probate court."

Stat. 1855, 300, read: "Issues of fact joined in the probate court, shall be certified by the probate judge to a district court of the same county for trial, on the application of any person interested in, or to be affected by the decision thereof, in the cases following: First, on granting or revoking letters testamentary or of administration. Second, on admitting a will to probate. Third, on revoking the probate or determining the validity of a will. Fourth, on setting apart property, or making allowances for a widow or child. Fifth, on application for the sale or conveyance of real property. Sixth, on the settlement of an executor or administrator. Seventh, on declaring, allowing, or directing the payment of a debt, legacy, claim or distributive share of the estate."

Stat. 1851, 486, read: "Appeals shall be allowed from the decisions of the probate court to the district court of the same county in the following cases: First, on all decisions issuing letters testamentary or of administration or guardianship. Second, on all decrees admitting any will to probate or determining the validity of any will. Third, on all decrees admitting any will to probate. Fourth, on all orders setting apart property or making allowances for the widow or child or children. Fifth, on all orders for the sale or conveyance of real estate. Sixth, on all settlements of executors or administrator or administrators. Seventh, on all orders directing the payment of debts or legacies, or the distribution of the estate among heirs, legatees, or distributees. Eighth, on all orders revoking letters testamentary or of administration. Ninth, on any allowance, order, decree, rule or decision whatever, made by the probate court or judge, manifestly irregular or unjust."

5 Cal. 433; 7 Cal. 230; 10 Cal. 499; 34 Cal. 685; 35 Cal. 510.

§ 1717. (§ 294.) **If no jury is demanded, the court must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite**

party, must settle and frame the issues to be tried and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial upon the same grounds and errors, and in like manner, as provided in this code for civil actions.

Vide § 1716 and note. 10 Cal. 500; 34 Cal. 682; 35 Cal. 510.

§ 1718. (N. S.) At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, partitions and distributions of estates; setting apart homesteads; and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court must appoint some competent attorney at law to represent, in all such proceedings, the devisees, legatees, heirs or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the state; and may, if he deem it necessary, appoint an attorney to represent those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The appearance of the attorney is sufficient proof of the service of the notice on the parties he is appointed to represent. The attorney may receive from the distributive shares of the estate set apart for the parties whom he represents, a fee not exceeding fifty dollars for his entire services; if there is no distribution of the estate, this fee must be paid out of the funds of the estate as necessary expenses of administration. If, for any cause, it becomes necessary, the probate court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided.

33 Cal. 54; 36 Cal. 280; 40 Cal. 463.

§ 1719. When a *judgment or* decree is made, setting apart a homestead, *confirming a sale,* making distribution of real estate, or determining any other matter affecting the title to real estate, a certified copy of the same must be recorded in the office of the recorder of the county in which the land is situated. *If the person entitled to the homestead or distribution is also executor*

or administrator, the recorded order of the probate court vests title thereto in such person, without a deed from the executor or administrator.

Stat. 1861, 654.

7 Cal. 230; 18 Cal. 499; 19 Cal. 388; 20 Cal. 124, 265; 23 Cal. 51; 28 Cal. 187; 35 Cal. 364; 36 Cal. 117, 280.

§ 1720. (§ 302) When it is not otherwise prescribed in this title, the probate court, or the supreme court on appeal, may in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the probate court.

Stat. 1855, 302, read: "by law," instead of "in this title."

Stat. 1851, 437, read: "when costs are awarded to one party to be paid by another, the said courts respectively may issue execution therefor."

6 Cal. 167; 19 Cal. 388; 33 Cal. 658; 36 Cal. 280.

§ 1721. (N. S.) Whenever an executor, administrator or guardian is committed for contempt, in disobeying any lawful order of the probate court or the judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the probate court may, by order reciting the facts, and without further showing or notice, revoke his letters, and appoint some other person entitled thereto executor, administrator or guardian, in his stead.

CHAPTER XIII.

OF PUBLIC ADMINISTRATOR.

SECTION 1726. What estates to be administered by public administrator.
1727. Public administrator to obtain letters, when and how. His bond and oath.
1728 Duty of persons in whose house any stranger dies.
1729. Must return inventory and administer estates according to this title.
1730. When another person is appointed administrator or executor, public administrator to deliver up the estate.
1731. Civil officers to give notice of waste to public administrator.
1732. Suits for property of decedents.
1733. Order to examine party charged with embezzling estate.
1734. Punishment for refusing to attend.
1735. Order on public administrator to account.
1736. Every six months to make and publish return of condition of estate.
1737. When there are no heirs or claimants, moneys and effects paid to county treasurer, etc.
1738. Not to be interested in the payments for or on account of estates in his hands.
1739. When to settle with county clerk, and how unclaimed estate disposed of.
1740. Proceedings, how and by whom instituted, against public administrator failing to pay over money as ordered.
1741. Fees of officers, when and by whom paid.
1742. Public administrator to administer oaths.
1743. Preceding chapters applicable to public administrator.

§ 1726. Every public administrator, duly elected, commissioned and qualified, must take charge of the estates of persons dying within his county as follows:

1. Of the estates of decedents for which no administrators are appointed, and which in consequence thereof are being wasted, uncared for, or lost.

2. Of the estates of decedents who leave no known heirs.

3. Of estates ordered into his hands by the probate court; and,

4. Of estates upon which letters of administration have been issued to him by the probate court.

Stat. 1851, 207, § 3, read: "he shall perform such duties and receive such compensation as may be prescribed by law."

Stat. 1860, 105, § 3, read; "he shall be authorized and required to perform such duties as are prescribed by law, and shall not be required to obtain letters of administration therefor, but may proceed to the performance of the same by virtue of his office, and shall receive such compensation as may be prescribed by law; *provided*, that the provisions of this act shall not apply to the city and county of San Francisco, and the city and county of Sacramento, but in said city and county of San Francisco, and the said city and county of Sacramento, the public administrator shall give bonds to be approved by the probate court, in the sum of not less than thirty thousand dollars, and shall procure letters of administration on each estate, by petition as in other cases."

§ 1727. (N. S.) Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in a like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath is in lieu of the administrator's bond and oath, but when real estate is ordered to be sold, another bond may be required by the court.

7 Cal. 230; 11 Cal. 128; 17 Cal. 238; 34 Cal. 468.

§ 1728. (§ 304.) Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator *of the county*; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.

Stat. 1851, 488, substantially the same.

7 Cal. 232.

§ 1729. (§ 305.) The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same according to the provisions

of this title, subject to the control and direction of the probate court.

Stat. 1851, 488, inserted the words, "as near as circumstances will permit"; between "same" and "according"; also, read: "to the law prescribing the duties of administration," instead of, "to the provisions of this title."

7 Cal. 232; 11 Cal. 127.

§ 1730. (§ 306.) If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the probate court, account for, pay and deliver to the executor or administrator thus appointed, all the money, property, papers and estate of every kind, in his possession *or under his control.*

Stat. 1851, 488, inserted the words, "on such estate," after "granted."

11 Cal. 127.

§ 1731. (§ 307.) All civil officers must inform the public administrator of all property known to them, *belonging to a decedent*, which is liable to *loss*, injury or waste, and which, *by reason thereof*, ought to be in possession of the public administrator.

Stat. 1851, 488, same in substance; inserting, "and estate," after "property;" also, "by law," instead of, "by reason thereof."

§ 1732. (§ 308.) The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers or other estate of the decedent.

§ 1733. (§ 309.) When the public administrator complains to the probate judge, on oath, that any person has concealed, embezzled or disposed of, or has in his possession any money, goods, property or effects, to the possession of which such administration is entitled in his official capacity, the judge may cite such person to appear before the probate court, and may examine him on oath touching the matter of such complaint.

§ 1734. (§ 310.) All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the probate court. If the person so cited refuses to appear and submit to such an examination, or to answer such interrogatories as may be put to him touching the matter of such

complaint, the court may commit him to the county jail, there to remain in close custody until he submits to the order of the court.

Stat. 1851, 488, substantially the same, inserting the words, "by warrant for that purpose," between "may" and "commit."

§ 1735. (§ 311.) The probate court may at any time order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed.

7 Cal. 232.

§ 1736. (§ 312.) The public administrator must, once in every six months, make to the probate judge, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the money which has come into his hands from such estate, and what he has done with it, and the amount of his fees and of expenses incurred, and the balance, if any, remaining in his hands; publish the same six times in some newspaper in the county, or if there is none, then post the same legibly written or printed, in the office of the county clerk of the county.

Satt. 1851, 489, read: "The public administrator shall render a yearly account to the county auditor of: First, a list of the estates which have come under his charge, the condition in which they are at the time of reporting, the disposition which has been made of any during the year. Second, the sums of money which have come into his hands, in each estate, and what disposition has been made of them, and the amount of his fees; which said amount shall be published in at least two journals of the state, one of which shall be in his own county, if there is one published."

7 Cal. 232; 11 Cal. 127.

§ 1737. After a final settlement of the affairs of any estate, if there be no heirs or other claimants thereof, the public administrator must pay over to the county treasury, to be paid into the state treasury, all moneys and effects in his hands belonging to the estate, and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates.

§ 1738. The public administrator must not be interested in expenditures of any kind made on account of any estate he administers, nor must he be associated in business or otherwise with any one who is so interested, and he must attach to his

report and publication, made in accordance with the preceding section, his affidavit to that effect.

Stat. 1851, 414, § 4, read: "No public administrator now in office or hereafter elected under this act, shall be interested, directly or indirectly, in expenditures of any kind made on account of any estates of deceased persons; nor shall he be associated in business or otherwise with any person who shall be so interested; and he shall annex to his report every six months, as required by the act, an affidavit, taken before a county or district judge, to that effect."

§ 1739. Public administrators are required to account under oath and to settle and adjust their accounts, relating to the care and disbursement of money or property belonging to estates in their hands, with the county clerks of their respective counties, on the first Monday in each month; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive.

Stat. 1853, 211, § 2, read: "Public administrators in their respective counties are hereby required to settle and adjust their accounts relating to the collection, care and disbursement of money or property belonging to the estates of deceased persons, with the county clerk, on the first Monday of each month."

§ 1740. When it appears, from the returns made in pursuance of the foregoing sections, that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the county treasurer, the probate judge must order the same to be paid over to the county treasurer, and on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite legal proceedings against the public administrator, for a judgment against him, and the sureties on his official bond, in the amount of money so withheld, and costs.

Stat. 1859, 213, § 1, was same in substance, inserting "by legal heirs or other claimants," after "unclaimed"; also, "in pursuance to law," between "which" and "should be paid."

§ 1741. The fees of all officers chargeable to estates in the hands of public administrators, must be paid out of the assets thereof so soon as the same come into his hands.

Stat. 1860, 357, § 2, read: "where estates have been ordered into the hands of the public administrator, the fees of all officers shall be charged to said estate, and the administrator shall pay the same to said officers as soon as sufficient money comes into his hands to pay the expenses of the administration."

Estate of Bezar Simmons, July Term, 1871.

§ 1742. Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.

Stat. 1860, 357, § 3, read: "The public administrator shall be authorized to administer all necessary oaths in the discharge of his duties as such, in the same manner and with like effect as notaries public, and shall be entitled to receive the same fees therefor."

§ 1743. (N. S.) When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern.

CHAPTER XIV.

OF GUARDIAN AND WARD.

ARTICLE I. GUARDIANS OF MINORS.
II. GUARDIANS OF INSANE AND INCOMPETENT PERSONS.
III. THE POWERS AND DUTIES OF GUARDIANS.
IV. THE SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.
V. NON-RESIDENT GUARDIANS AND WARDS.
VI. GENERAL AND MISCELLANEOUS PROVISIONS.

ARTICLE I.

GUARDIANS OF MINORS.

SECTION 1747. Probate judge to appoint guardians, when, and on what petition.
1748. When minor may nominate guardian; when not.
1749. When appointment may be made by Judge, when minor is over fourteen.
1750. Nomination by minors after arriving at fourteen.
1751. Father or mother entitled to guardianship.
1752. Minor having no father or mother.
1753. Powers and duties of guardian.
1754. Bond of guardian, conditions of.
1755. Probate judge may insert conditions in order appointing guardian.
1756. Letters of guardianship and bond of guardian to be recorded.
1757. Maintenance of minor out of income of his own property.
1758. Guardian to give bond. Powers limited.
1759. Power of courts to appoint guardians and next friend not impaired.

§ 1747. (§§ 1, 836.) The probate judge of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who

have no guardian legally appointed by will, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person, *in behalf of such minor*. Before making the appointment, the judge must cause such notice *as (he) deems reasonable* to be given to the relatives of the minor residing in the county, and to any person under whose care such minor may be, *as he deems reasonable*.

Stat. 1861, 603-4, § 1, was substantially the same; inserting the words, "interested in or befriending," instead of, "in behalf of"; also, omitting the words, "on due inquiry."

Stat. 1850, 268, § 1, omitted all after the words, "estate within the county"; also the words, "for the persons and estates, or either of them."

15 Cal. 249; 33 Cal. 54; De la Montagnie v. Union Insurance Co., Oct. T., 1871.

§ 1748. (§§ 2, 337.) If the minor is under the age of fourteen years, the probate judge may nominate and appoint his guardian. If he is above the age of fourteen years, he may nominate his own guardian, who, if approved by the judge, must be appointed accordingly.

Stat. 1850, 269, § 2.

§ 1749. (§§ 3, 338.) If the guardian nominated by the minor is not approved by the judge, or if the minor resides out of the state, or if after being duly cited by the judge, he neglects for ten days to nominate a suitable person, the judge may nominate and appoint the guardian, in the same manner as if the minor were under the age of fourteen years.

Stat. 1850, 269, § 3.

§ 1750. (§§ 4, 339.) When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the probate judge.

Stat. 1850, 269, § 4.

§ 1751. (§§ 5, 340.) The father of the minor, if living, and in case of his decease the mother while she remains unmarried, being themselves respectively competent to transact their own

business and not otherwise unsuitable, must be entitled to the guardianship of the minor.

Stat. 1850, 269, § 5

§ 1752. (§§ 6, 341.) If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same.

Stat. 1850, 269, § 6, substantially the same.
19 Cal. 183; 22 Cal. 398; 37 Cal. 663; 49 Cal. 456.

§ 1753. (§§ 7, 342.) Every guardian appointed, shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged.

Stat. 1850, 269, § 7, substantially the same, inserting "tuition" instead of "care of the education"; also, "twenty-one years" instead of "majority."
19 Cal. 188; 37 Cal. 662

§ 1754. (§§ 8, 343.) Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody and education of the ward.

3. To render an account, on oath, of the property, estate and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the probate judge, or with the

ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys and effects remaining in his hands or due from him on such settlement, to the person who is lawfully entitled thereto.

Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form, the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon, that he will perform the duties of his office as such guardian, according to law.

Stat. 1861, 604, § 2, substantially the same; inserting the words, "and when th penal sum of the bond exceeds two thousand dollars, each of the sureties may become liable for portions thereof, making in the aggregate the whole penal sum," between the words, "order" and "conditioned"; also, "or persons" after "person" in subdivision 3.

Stat. 1850, 263, § 8, read down to subdivision 1, as follows: "Before appointing any person guardian of a minor, the judge shall require of such person a bond to the minor with sufficient sureties to be approved by the judge, and in such sum as he shall order, conditioned as follows":

The subdivisions then followed, and were the same, inserting "one year" instead of "three months," in subdivision 3; all after the words, "lawfully entitled thereto" was omitted.

§ 1755. When any person is appointed guardian of a minor, the probate judge may, with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the minor; the performance of such conditions is a part of the duties of the guardian, for the faithful performance of which, he and the sureties on his bond are responsible.

§ Stat. 1865-6, 380, § 1, substantially the same, inserting "of the trust" after "duties."

§ 1756. All letters of guardianship issued, and all guardians' bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the probate court having jurisdiction of the persons and estates of the wards.

Stat. 1861, 607, § 15, read; "hereafter issued" and "hereafter executed"; also, "forthwith recorded"; also added the words, "respectively, in a book kept by him in his office for that purpose, and said records and duly certified copies thereof, shall have the same force and effect in all cases whatsoever, as the originals thereof would have."

§ 1757. (§§ 9, 344.) If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father

can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the probate court; and the charges therefor may be allowed accordingly, in the settlement of the accounts of his guardian.

Stat. 1850, 269 § 9, same substantially.

§ 1758. (§§ 10, 345.) Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties, with regard to the person and estate of his ward, as guardians appointed by the probate court, except so far as their powers and duties are legally modified, enlarged or changed by the will by which such guardian was appointed.

Stat. 1861, 604, § 3, substantially the same, prefixing the words: "The father of any child, who is a minor, may, by his last will and testament, appoint a guardian or guardians of such child, whether born before or after the time of making such will, and in case of the death of the father, the mother of such child may, in like manner, appoint a guardian, or guardians, if such child shall not then have any legally appointed guardian."

Stat. 1850, 269, § 10, read: "The father of every legitimate child which is a minor, may, by his last will in writing, appoint a guardian or guardians for his minor children, whether born at the time of making such will or afterwards, to continue during the minority of such child or for any less time; and every such testamentary guardian shall give bond in like manner, and with like condition as her inbefore required; and he shall have the same powers, and shall perform the same duties, with regard to the person and estate of the ward, as a guardian appointed as aforesaid."

§ 1759. (§§ 11, 346.) Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.

15 Cal. 249; 19 Cal. 629; 37 Cal. 668; Smith v. McDonald, Oct. T., 1871.

Stat. 1850, 269, § 11, added the words, "nor to appoint or allow any person, as the next friend of a minor, to commence and prosecute any suit in his behalf."

ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

SECTION 1763. Guardians of insane and other incompetent persons
1764. Appointment by probate judge after hearing.
1765. Powers and duties of such guardians.

§ 1763. (§§ 12, 347.) When it is represented to the probate judge, upon verified petition of any relative or friend, that any person is insane, or, from any cause, mentally incompetent to manage his property, the judge must cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

Stat. 1850, 269, §12, inserted the words: "of any insane person, or of any person who, by reason of extreme old age, or other cause, is mentally incompetent to manage his property," between the words, "friend" and "that"; also read: "and shall also cause such person, if able to attend, to be produced before him on the hearing," instead of "and such person, if able to attend, must be produced before him on the hearing."

4 Cal. 313.

§ 1764. (§§ 13, 348.) If, after a full hearing and examination upon such petition, it appears to the probate judge that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this chapter specified.

Stat. 1850, 270, § 13, same, reading "hereinafter" instead of "in this chapter."

19 Cal. 162.

§ 1765. (§§ 14, 349.) Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

Stat. 1850. 270, § 14.

36 Cal. 656.

ARTICLE III.

THE POWERS AND DUTIES OF GUARDIANS.

SECTION 1763. Guardian to pay debts of ward out of ward's estate.
1769. Guardian to recover debts due his ward and represent him.
1770. Guardian to manage his estate, maintain ward and sell real estate.
1771. Maintenance, support and education of ward, how enforced.
1772. May assent to a partition of real estate.
1773. Guardian to return inventory of estate of ward. Appraisers to be appointed. Like proceedings when other property acquired.
1774. Settlements of guardians.
1775. Allowance of accounts of joint guardians.
1776. Expenses and compensation of guardians.

§ 1768. (§§ 15, 350.) Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title for the sale of real estate of decedents.

Stat. 1850, 270, § 15, read: "by law" instead of "in this title for the sale of the real estate of decedents."

20 Cal. 382; 36 Cal. 657.

§ 1769. (§§ 16, 351.) Every guardian must settle all accounts of the ward, and demand, sue for and receive all debts due to him, or may, with the approbation of the probate judge, compound for the same and give discharges to the debtors on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose as guardian or next friend.

Stat. 1850, 270, § 16.

20 Cal. 676; 32 Cal. 118; 36 Cal. 451; Smith v. McDonald, Oct. T., 1871.

§ 1770. (§§ 17, 352.) Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order *of the court* therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

Stat. 1850, 270, § 17, inserted "by law" after "as provided."

Stat. 1861, 569, § 6, authorizing incorporations for homestead purposes, read, in part, as follows: "Parents and guardians may take and hold shares in such associations in behalf and for the use of their minor children or wards; *provided*, the cost of such shares, and the amount of deposits and assessments thereon, be paid from the personal earnings of such minor children or wards, or by gifts from persons other than their male parents."

9 Cal. 592; 35 Cal. 345; 40 Cal. 458.

§ 1771. When a guardian has advanced for the necessary maintenance, support or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects or refuses to furnish suitable and necessary maintenance, support or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

§ 1772. (§§ 18, 353.) The guardian may join in and assent to a partition of the real estate of the ward, wherever such assent may be given by any person.

Stat. 1850, 270, § 18, read: "in the cases and in the manner provided by law," instead of, "whenever such assent may be given by any person."

§ 1773. (§§ 19, 354.) Every guardian must return to the probate court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the probate court. The probate court may, upon application made for that purpose by any person, compel the guardian to render an account to the probate court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, *sworn* and acting in the manner provided for regulating the settlement of the estate of decedents; such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the probate court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

Vide stat. 1870, 791, § 1, was substantially the same, inserting the words, "interested in the estate of any ward, or by any person of kin or related to any ward," between "person" and "compel"; also, "and all of the guardians, whenever there shall be more than one guardian," between "guardian" and "all the estate."

Stat. 1850, 270, § 19, read: "The guardian shall return an inventory of the estate of his ward at such time as may be fixed by the court; the estate and effects comprised therein shall be appraised by three suitable persons, to be appointed and sworn in like manner as is required with respect to the inventory of the estate of a deceased testator or intestate; and every guardian shall account for and dispose of the personal estate of the ward in like manner as is directed with respect to executors and administrators."

§ 1774. (§§ 35, 370.) The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the probate court for settlement and allowance.

Stat. 1850, 271, § 35, added the words, "and all the laws relative to the accounts of executors and administrators shall govern in regard to the accounts of a guardian, so far as they can be made applicable."

19 Cal. 390; 36 Cal. 654.

§ 1775. (§§ 49, 384.) When an account is rendered by two or more joint guardians, the probate judge may, in his discretion, allow the same upon the oath of any of them.

Stat. 1850, 273, § 49.
36 Cal. 655.

§ 1776. (§§ 47, 382.) Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

Stat. 1850, 273, § 47.

ARTICLE IV.

THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

SECTION 1777. May sell property in certain cases.
1778. Sale of real estate to be made upon order of court.
1779. Application of proceeds of sales.
1780. Investment of proceeds of sales.
1781. Order for sale, how obtained.
1782. Notice to next of kin, how given.
1783. Copy of order to be served, published or consent filed.
1784. Hearing of application.
1785. Who may be examined on such hearing.
1786. Costs to be awarded to whom.
1787. Order of sale, to specify what.
1788. Bond before selling.
1789. All proceedings for sales of property by guardians to conform to chapter seven of this title.
1790. Limit of order of sale.
1791. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.
1792. Probate court may order the investment of money of the ward.

§ 1777. (§§ 20, 355.) When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to *maintain and* educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Stat. 1861, 605, § 5, inserted "of any person" between "estate" and "under"; also added the words: "and proceeding therein as provided in this act."

Stat. 1850, 270, § 20, same as stat. 1861, inserting "or to educate his family" before "or to educate the ward, when a minor."

20 Cal. 382; 35 Cal. 345.

§ 1778. (§§ 21, 356.) When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

Stat. 1861, 605, § 6, substantially the same, adding the words, "and proceeding therein as provided in this act."

Stat. 1850, 270, § 21, substantially the same, omitting the words, "put out at interest"; also the words, "or in the improvement or security of any other real estate of the ward"; also adding the words, "and proceeding therein as hereinafter provided."

9 Cal. 592; 20 Cal. 332; De La Montagnie v. Union Ins. Co., Oct. T., 1871; Scott v. Umbarger, April T., 1871.

§ 1779. (§§ 22, 357.) If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Stat. 1850, 270, § 22, read: "twentieth section of this act" instead of "in this article."

§ 1780. (§§ 23, 358.) If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the probate court.

Stat. 1850, 270, § 23, inserted, "as provided in this act," after "proceeds."

§ 1781. (§§ 24, 359.) To obtain an order for such sale, the guardian must present to the probate court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

Stat. 1850, 271, § 24.

§ 1782. (§§ 25, 360.) If it appears to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made.

Stat. 1861, 605, § 7, read: "the same proceedings shall be thereupon had in reference to the notice of the application, and to ordering a sale, and making such sales as are provided in relation to sales of personal estate by executors or administrators," instead of, "the court must order the sale to be made."

Stat. 1850, 271, § 25, omitted the words, "or judge"; also, "or that the real and personal estate should be sold"; also the last sentence.

Scott v. Umbarger, April T., 1871.

§ 1783. (§§ 26, 361.) A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county; or, if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. *If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published.*

Stat. 1861, 606, § 8, inserted the words, "to be designated by the court or judge," between "county" and "or, if."

Stat. 1850, 271, § 26, omitted the words, "or judge": also words in italics.

§ 1784. (§§ 27, 362.) The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate who oppose the application.

Stat. 1861, 606, § 9, read: "adjourned" instead of "postponed"; also "due service"; also "who shall think proper to oppose the application."

Stat. 1850, 271, § 27, read: "probate judge" instead of "probate court"; otherwise same as stat. 1861.

§ 1785. (§§ 28, 363.) On the hearing the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the probate court or judge, in the same manner and with like effect as in other cases *provided for in this title.*

Stat. 1861, 606, § 10.

Stat. 1850, 271, § 28, read. "probate judge" instead of "probate court or judge."

§ 1786. (§§ 29, 364.) If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

Stat. 1850, 271, § 29, read: "thereto is unreasonable, said court may, in its discretion, award costs to the party prevailing, and enforce the payment thereof."

§ 1787. (§§ 30, 365.) If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate or some part thereof should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

Stat. 1861, 606, § 11, read; "specifying therein for which of the causes or reasons, mentioned in sections twenty and twenty-one of said act, said sale is necessary or proper," etc.; also added the words, "upon like proceedings and in the same manner as provided by law in case of a sale of real estate by an executor or administrator, and subject to the same pro-

ceedings in relation to the confirmation or rejection of the sale, or the re-sale thereof."

Stat. 1850, 271, § 30, read: "specifying therein whether the sale is to be made for the maintenance of the ward and his family, or for the education of the ward and his children; or in order that the proceeds may be put out and invested."

§ 1788. (§§ 31, 366.) Every guardian authorized to sell real estate must, before the sale, give bond to the probate judge, with sufficient surety to be approved by him, with condition to sell the same in the manner, and to account for the proceeds of the sale, as provided for in this chapter and chapter seven of this title.

Stat. 1850, 271, § 31, read: "with condition to sell the same in the manner prescribed by law, for sales of real estate by executors and administrators; and to account for and dispose of the proceeds of the sale, in the manner provided by law."

§ 1789. (N. S.) All the proceedings under petition of guardians for sales of property of their wards, giving notice and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, re-selling the same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter.

Vide §§ 1788, 1774, 1782, 1787, and notes.

§ 1790. (§§ 33, 368.) No order of sale, granted in pursuance of this article, continues in force more than one year after granting the same, *without a sale being had.*

Stat. 1861, 606, § 12.

§ 1791. (§§ 50, 385.) All sales of real estate of wards must be for cash, or for part cash and part deferred payments, not to exceed three years, bearing date from date of sale, as, in the discretion of the probate judge, is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers bond and mortgage on the real estate sold, with such additional security as the judge deems necessary and sufficient to

secure the faithful payment of the deferred payments and the interest thereon.

Stat. 1850, 271, § 33, omitted the words, "of sale"; also words in italics.

Stat. 1853, 129, § 1, instead of "wards" read "minor heirs, made for the benefit of said minor heirs in accordance with the provisions of this act."

§ 1792. (§§ 36, 371.) The probate court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the probate judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the probate court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require.

Stat. 1861, 606, § 13, substantially the same.

Stat. 1850, 271, § 36, read: "probate judge"; also inserted "in their respective counties" after "probate judges"

ARTICLE V.

NON-RESIDENT GUARDIANS AND WARDS.

SECTION 1793. Guardians of non-resident persons.
1794. Powers and duties of guardians appointed under preceding section.
1795. Such guardians to give bonds.
1796. To what guardianship shall extend.
1797. Removal of non-resident ward's property.
1798. Proceedings on such removal.
1799. Discharge of person in possession.

§ 1793. (§§ 43, 378.) When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state, and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the probate judge of any county in which there is any estate of such absent person *for the appointment of a guardian*; and if, after notice given to all interested, in such

manner as the judge orders, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

Stat. 1861, 607, § 14, inserted the words, "by publication or otherwise" between "orders" and "and a full"; also "any minor or other person" instead of "a person."

Stat. 1850, 271, § 43, same in substance, omitting words in italics; also reading "any minor or other person" instead of "a person."

19 Cal. 629.

§ 1794. (§§ 44, 379.) Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

Stat. 1850, 272, § 44.

§ 1795. (§§ 45, 380.) Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.

Stat. 1850, 272, § 45.

§ 1796. (§§ 46, 381.) The guardianship which is first lawfully granted, of any person residing without this state, extends to all the estate of the ward within the same, and excludes the jurisdiction of the probate court of every other county.

Stat. 1850, 272, § 46.

§ 1797. (§§ 1, 386.) When the guardian and ward are both non-residents, and the ward is entitled to property in this state which may be removed to another state or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward, upon the application of the guardian to the probate judge of the county in which the estate of the ward, or the principal part thereof, is situated.

Stat. 1858, 59, § 1, omitted the words, "or foreign country," wherever they occur.

§ 1798. (§§ 2, 387.) The application must be made upon ten days notice to the resident, executor, administrator or guardian, if there be such, and upon such application the non-resident guardian must produce and file a certificate under the hand of the clerk and seal of the court, from which his appointment was derived, showing—

1. A transcript of the record of his appointment.
2. That he has entered upon the discharge of his duties.
3. That he is entitled, by the laws of the state, to his appointment to the possession of the estate of the ward.

Upon such application, unless good cause to the contrary is shown, the probate judge must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.

Stat. 1858, 59, § 2, read: "The guardian must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing that he has been appointed guardian of the ward, in the state in which he and the ward reside, and has qualified as such, according to the laws thereof, and gave bond with sureties for the performance of his trust; and must also give thirty days' notice to the resident executor, administrator or guardian, if there be such, of the intended application; thereupon, if good cause be not shown to the contrary, the probate judge shall make an order, granting such guardian leave to remove the property of his ward to the state or place of his residence, which shall be an authority to him to sue for, and receive the same, in his own name, for the use and benefit of his ward."

§ 1799. (§§ 3, 388.) Such order is a discharge of the executor, administrator, *local* guardian, or other person in whose possession the property may be at the time the order is made, *on filing with the probate court the receipt therefor of the foreign guardian of such absent ward.*

Stat. 1858, 59, § 3.

ARTICLE VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

SECTION 1800. Examination of persons suspected of defrauding wards or concealing property.

1801. Removal and resignation of guardian, and surrender of estate.
1802. Guardianship, how terminated.
1803. New bond, when required.
1804. Guardian's bond to be filed. Action on.
1805. Limitation of actions on guardian's bond.
1806. Limitation of actions for the recovery of property sold.
1807. More than one guardian of a person may be appointed.
1808. Power of probate judge in chambers.
1809. Provisions of section ten hundred and fifty-seven apply to guardians.

§ 1800. (§§ 42, 377.) Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled or conveyed away any of the money, goods or effects, or an instrument in writing, belonging to the ward *or to his estate*, the probate judge may cite such suspected person to appear before him, and may examine and proceed with him on such charge in the manner provided *in this title* with respect to persons suspected of, and charged with, concealing or embezzling the effects of a decedent.

Stat. 1850, 272, § 42, same in substance.

§ 1801. (§§ 37, 372.) When a guardian, appointed either by the testator or the probate judge, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, *or failed for thirty days to render an account or make a return*, the probate court may, upon *such* notice to the guardian *as the court may require*, remove him *and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto.* Every guardian may resign, when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the probate court or the judge thereof, may appoint another in the place of the guardian who has resigned or has been removed.

Stat 1869-70, 792, § 2, read: "evidently unsuitable"; also, "probate court or judge thereof"; also, "deem sufficient," instead of, "require"; also inserted, "upon request be allowed," between "may" and "resign."

Stat. 1850, 272, § 37, read: "evidently unsuitable"; also, "probate judge"; also inserted, "upon request, be allowed to," between "may" and "resign"; also, "to the probate judge," between "appears" and "proper"; also, "and upon the death of any guardian," between "removal" and "of a"; also, "in his place," instead of, "in the place of the guardian who has resigned or has been removed."

38 Cal. 442.

§ 1802. (§§ 38, 373.) The marriage of a minor ward terminates the guardianship; and the guardian of an insane or other person may be discharged by the probate judge when it appears to him, on the application of the ward or otherwise, that the guardianship is no longer necessary.

Stat. 1850, 272, § 38, substantially the same.

§ 1803. (§§ 39, 374.) The probate judge may require a new bond to be given by a guardian whenever he deems it necessary, and may discharge the existing sureties from further liability, after due notice given as he may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

Stat. 1850, 272, § 39.

§ 1804. (§§ 40, 375.) Every bond given by a guardian must be filed and preserved in the office of the clerk of the probate court of the county; and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate.

Stat. 1850, 272, § 40, inserted "in the name of the ward," between "prosecuted" and "for the use." 32 Cal. 118.

§ 1805. (§§ 41, 376.) No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge *or removal* of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

Stat. 1850. 272, § 41.

§ 1806. (§§ 34, 369.) No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or

when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

Stat. 1850, 271, § 34, same in substance.

§ 1807. (§§ 48, 383.) The court in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

Stat. 1850, 273, § 48, same in substance.

§ 1808. The power conferred upon the probate judge in relation to guardians and wards may be exercised by him at chambers, or as the act of the probate court, when holding such court; and any order appointing a guardian must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the probate or the district courts, applies to proceedings under this chapter.

Stat. 1861, 607, § 16, same in substance, adding the words, "where they do not conflict with any of the provisions of this act."

38 Cal. 441.

§ 1809. The provisions of section ten hundred and fifty-seven are hereby declared to apply to guardians appointed by the court, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.

TITLE XII.

OF SOLE TRADERS.

SECTION 1811. Who may become sole traders.
1812. Notice, how given and what to contain.
1813. Petition, what to contain and when filed.
1814. May have five hundred dollars of community or husband's property.
1815. Who may oppose it, and how.
1816. Trial or hearing.
1817. Decree, what it must be.
1818. Oath, copy of order to be recorded.
1819. Rights and liabilities of sole traders.
1820. Sole trader must maintain her children.
1821. Husband of sole trader not liable for debts

§ 1811. A married woman may become a sole trader by the judgment of the county court of the county in which she has resided for six months next preceding the application.

Stat. 1852, 101, § 1, read: "Married women shall have the right to carry on and transact business under their own name, and on their own account, by complying with the regulations prescribed in this act."

39 Cal. 287.

§ 1812. A person intending to make application to become a sole trader must publish notice of such intention in a newspaper published in the county, or if none, then in a newspaper published in an adjoining county, for four successive weeks. The notice must specify the term and the day upon which application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband.

Stat. 1862, 108, § 1, read: "Any married woman, residing within this state, desirous to avail herself of the benefit of this act, shall give notice thereof, by advertising in some public newspaper of general circulation in the county in which she resides, for four successive weeks: *provided*, if any newspaper be published in said county, said publication shall be made in the paper so published in said county. Such notice shall set forth that it is her intention to make application to the district court of said county, on the day therein named, for an order of said court, permitting her to carry on business in her own name and on her own account, and it shall specifically set forth the nature of the business to be carried on. On the day named in the notice, or at such further time as the court may appoint, on filing proof of publication, the court shall proceed to examine the application, on oath, as to the reasons which induce

her to make the application; and if it appear to the court that a proper case exists, it shall make an order, which shall be entered on the minutes, that the applicant be authorized and empowered to carry on, in her own name, and on her own account, the business, trade profession or art named in the notice; but the insolvency of the husband, apart from other causes tending to prevent his supporting his family, shall not be deemed to be sufficient cause for granting this application. Any creditor of the husband may oppose such application, and may show that it is made for the purpose of defrauding such creditor, and preventing him from collecting his debt, or will occasion such result, and if it shall so appear to the court, the application shall be denied. On the hearing, witnesses may be examined on behalf of either party. Before making the order, the court or judge shall administer to the applicant the following oath: 'I, A. B., do, in presence of Almighty God, truly and solemnly swear, that this application is made in good faith, for the purpose of enabling me to support myself and my children (if the applicant have minor children,) and not with any view to defraud, delay or hinder, any creditor or creditors of my husband; and that of the moneys so to be used, in said business, not more than five hundred dollars has come, either directly or indirectly from my husband, so help me God.' A certified copy of said order, with the oath indorsed thereon, shall be recorded in the office of the recorder of the county where the business is to be carried on, in a book to be kept for such purpose."

22 Cal. 283; 23 Cal. 388.

§ 1813. Ten days prior to the day named in the notice, the applicant must file a verified petition setting forth—

1. That the application is made in good faith, to enable the applicant to support herself, or herself and others dependent upon her, giving their names and relation.

2. The fact of insufficient support from her husband, and the causes thereof, if known.

3. Any other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought; and,

4. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.

Vide § 1812 and note.

§ 1814. The applicant may invest in the business proposed to be conducted, a sum derived from the community property or of the separate property of the husband, not exceeding five hundred dollars.

Vide § 1812 and note.

§ 1815. Any creditor of the husband may oppose the application, by filing in the court (prior to the day named in the notice) a written opposition verified, containing either—

1. A specific denial of the truth of any material allegation of the petition; or setting forth,

2. That the application is made for the purpose of defrauding the opponent; or,

3. That the application is made to prevent, or will prevent him from collecting his debt.

Vide § 1812 and note.

§ 1816. On the day named in the notice, or on such other day to which the hearing may be postponed by the court, the applicant must make proof of publication of the notice hereinbefore required, and the issues of fact joined, if any, must be tried as in other cases; if no issues are joined, the court must hear the proofs of the applicant and find the facts in accordance therewith.

Vide § 1812 and note.

§ 1817. If the facts found sustain the petition, the court must render judgment authorizing the applicant to carry on in her own name and on her own account, the business specified in the notice and petition.

Vide § 1812 and note.

§ 1818. The sole trader must make and file with the clerk of the court an affidavit, in the following form:

I, A. B., do in the presence of Almighty God, solemnly swear that this application was made in good faith, for the purpose of enabling me to support myself, (and any dependent, such as husband, parent, sister, child or the like, naming them, if any) and not with any view to defraud, delay or hinder any creditor or creditors of my husband; and that of the moneys so to be used by me in business, not more than five hundred dollars has come either directly or indirectly from my husband. So help me God.

A certified copy of the decree, with this oath endorsed thereon, must be recorded in the office of the recorder of the county where the business is to be carried on, in a book to be kept for such purpose.

Vide § 1812 and note.

7 Cal. 455.

§ 1819. When the judgment is made and entered, and a copy thereof, with the affidavit provided for in section one thousand eight hundred and eighteen, duly recorded, the person therein named is entitled to carry on the business specified, in her own name, and the property, revenues, moneys and credits so by her invested, and the profits thereof, belong exclusively to her and are not liable for any debts of her husband, and she thereafter has all the privileges of and is liable to all legal processes provided for debtors and creditors, and may sue and be sued alone, without being joined with her husband.

Stat. 1862, 109, § 2, was substantially the same, adding the words, "But nothing contained in this act shall be deemed to authorize a married woman to carry on business in her own name, when the same is managed or superintended by her husband."

6 Cal. 497; 7 Cal. 455; 22 Cal. 522; 29 Cal. 564; 31 Cal. 104; 39 Cal. 287

§ 1820. A married woman who is adjudged a sole trader is responsible and liable for the maintenance of her *minor* children.

Stat. of 1852, p. 101, § 4, was same in substance.

§ 1821. The husband of a sole trader is not liable for any debts contracted by her in the course of her sole trader's business, unless contracted upon his written consent.

Stat. of 1852, p. 101, § 6, was substantially the same, adding the words, "nor shall his separate property be taken on execution for any debts contracted by her."

TITLE XIII.

OF PROCEEDINGS IN INSOLVENCY.

SECTION 1822. Statutes in relation to, continued in force.

§ 1822. Nothing in this code affects any of the provisions of "an act for the relief of insolvent debtors and protection of

creditors," approved May 4th, 1852, or of the acts amendatory thereof, approved respectively March 12th, 1858, April 27th, 1860, and April 27th, 1863, but such acts are recognized as continuing in force notwithstanding the provisions of this code.

PART IV.

OF EVIDENCE.

GENERAL DEFINITIONS. §§ 1823–1839.

TITLE I. OF GENERAL PRINCIPLES. §§ 1844–1870.

TITLE II. KINDS AND DEGREES OF EVIDENCE. §§ 1875–1978.

TITLE III. PRODUCTION OF EVIDENCE. §§ 1981–2054.

TITLE IV. EFFECT OF EVIDENCE. § 2061.

TITLE V. RIGHTS AND DUTIES OF WITNESSES. §§ 2064–2070.

TITLE VI. EVIDENCE IN PARTICULAR CASES, AND GENERAL PROVISIONS. §§ 2074–2103.

OF EVIDENCE.

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1823. Definition of evidence.
1824. Definition of proof.
1825. Definition of law of evidence.
1826. The degree of certainty required to establish facts.
1827. Four kinds of evidence specified.
1828. Several degrees of evidence specified.
1829. Original evidence defined.
1830. Secondary evidence defined.
1831. Direct evidence defined.
1832. Indirect evidence defined.
1833. Primary evidence defined.
1834. Partial evidence defined.
1835. Satisfactory evidence defined.
1836. Indispensable evidence defined.
1837. Conclusive evidence defined.
1838. Cumulative evidence defined.
1839. Corroborative evidence defined.

§ 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

N. Y. C. C. P. § 1669; Or. C. C. P. § 695.

§ 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

N. Y. C. C. P. § 1660; Or. C. C. P. § 695.
31 Cal. 201.

§ 1825. The law of evidence, which is the subject of this part of the code, is a collection of general rules established by law—

1. For declaring what is to be taken as true without proof.
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence.
4. For the exclusion of whatever is not legal.
5. For determining, in certain cases, the value and effect of evidence.

N. Y. C. C. P. § 1661; Or. C. C. P. § 656.

§ 1826. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

N. Y. C. C. P. § 1662; Or. C. C. P. § 657.

§ 1827. There are four kinds of evidence:

1. The knowledge of the court.
2. The testimony of witnesses.
3. Writings.
4. Other material objects presented to the senses.

N. Y. C. C. P. § 1663; Or. C. C. P. § 658

§ 1828. There are several degrees of evidence:

1. Original and secondary.
2. Direct and indirect.
3. Primary, partial, satisfactory, indispensable and conclusive.

N. Y. C. C. P. § 1664; Or. C. C. P. § 659.

§ 1829. Original evidence is an original writing or material object introduced in evidence.

N. Y. C. C. P. § 1665; Or. C. C. P. § 660.

§ 1830. Secondary evidence is a copy of such original writing or object, or oral evidence thereof.

N. Y. C. C. P. § 1666; Or. C. C. P. § 661.

§ 1831. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For

example: if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

N. Y. C. C. P. § 1667; Or. C. C. P. § 662.

§ 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

N. Y. C. C. P. § 1668; Or. C. C. P. § 663.

§ 1833. Primary evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is primary evidence of a record, but it may afterwards be rejected upon proof that there is no such record.

N. Y. C. C. P. § 1669; Or. C. C. P. § 664.

§ 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute, by proof of other facts. For example: on an issue to title of real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute.

N. Y. C. C. P. § 1670; Or. C. C. P. § 665.

§ 1835. That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

N. Y. C. C. P. § 1671; Or. C. C. P. § 666.

§ 1836. Indispensable evidence is that without which a particular fact cannot be proved.

N. Y. C. C. P. § 1672; Or. C. C. P. § 667.

§ 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

N. Y. C. C. P. § 1673; Or. C. C. P. § 668.

§ 1838. Cumulative evidence is additional evidence of the same character to the same point.

N. Y. C. C. P. § 1674; Or. C. C. P. § 669.

§ 1839. Corroborative evidence is additional evidence of a different character, to the same point.

N. Y. C. C. P. § 1675; Or. C. C. P. § 670.

TITLE I.

OF THE GENERAL PRINCIPLES OF EVIDENCE.

SECTION 1844. One witness sufficient to prove a fact.
1845. Testimony confined to personal knowledge.
1846. Testimony to be in presence of persons affected.
1847. Witness presumed to speak the truth.
1848. One person not affected by acts of another.
1849. Declarations of predecessor in title evidence.
1850. Declarations which are a part of the transaction.
1851. Evidence relating to third person.
1852 Declaration of decedent evidence of pedigree.
1853. Declaration of decedent evidence against his successor in interest.
1854. When part of a transaction proved, the whole is admissible.
1855. Contents of writing, how proved.
1856. An agreement reduced to writing deemed the whole.
1857. Construction of language relates to place where used.
1858. Construction of statutes and instruments, general rule.
1859. The intention of the legislature or parties.
1860. The circumstances to be considered.
1861. Terms to be construed in their general acceptation.
1862. Written words control those printed in a blank form.
1863. Persons skilled may testify to decipher characters.
1864. Of two constructions, which preferred.
1865. A written instrument construed as understood by parties.
1866. Construction in favor of natural right preferred.
1867. Material allegation only to be proved.
1868. Evidence confined to material allegation.
1869. Affirmative only to be proved.
1870. Facts which may be proved on trial.

§ 1844. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

N. Y. C. C. P. § 1677; Or. C. C. P. § 671.

§ 1845. A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others are admissible.

N. Y. C. C. P. § 1678; Or. C. C. P. § 672.

§ 1846. A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

N. Y. C. C. P. § 1679.

§ 1847. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

N. Y. C. C. P. § 1680; Or. C. C. P. § 673.

Vide §§ 1879–2051.

Stat. 1867–8, 193–4, § 1, read: "In any civil or criminal action or proceeding, a witness may be discredited or impeached, and for such purpose, his general character for truth, honesty and integrity may be inquired into."

Vide §§ 2051, 2052.

§ 1848. The rights of the party cannot be prejudiced by the declaration, act or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another.

N. Y. C. C. P. § 1681; Or. C. C. P. § 674.

2 Cal. 145; 9 Cal. 251; 23 Cal. 101; 40 Cal. 396.

§ 1849. Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

N. Y. C. C. P. § 1682; Or. C. C. P. § 675.

5 Cal. 84; 8 Cal. 109, 325; 15 Cal. 50; 23 Cal. 331; 36 Cal. 205; 38 Cal. 51, 279; 40 Cal. 474.

§ 1850. Where, also, the declaration, act or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction.

N. Y. C. C. P. § 1683; Or. C. C. P. § 676.
27 Cal. 572; 29 Cal. 637; 35 Cal. 49, 274, 373.

§ 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be evidence for or against such person is primary evidence between the parties.

N. Y. C. C. P. § 1684; Or. C. C. P. § 677.

§ 1852. The declaration, act or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

N. Y. C. C. P. § 1685; Or. C. C. P. § 678.

§ 1853. The declaration, act or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

N. Y. C. C. P. § 1686; Or. C. C. P. § 679.

§ 1854. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence.

N. Y. C. C. P. § 1687; Or. C. C. P. § 680.
9 Cal. 529; 20 Cal. 637; 38 Cal. 279.

§ 1855. (§ 447.) There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

3. When the original is a record or other document in the custody of a public officer.

4. When the original has been recorded, and a certified copy of the record is made evidence *by this code or* by statute.

5. When the original consists of numerous accounts or other documents, which cannot be examined in the court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.

See N. Y. C. C. P. § 1688; and Or. C. C. P. § 681.

Subdivision 1.—5 Cal. 467; 6 Cal. 460; 9 Cal. 430; 10 Cal. 126; 12 Cal. 11, 104; 15 Cal. 63, 133; 17 Cal. 569; 18 Cal. 165; 19 Cal. 640; 22 Cal. 51; 30 Cal. 360. *Vide* § 1937.

Subdivision 2.—9 Cal. 593; 12 Cal. 493; 15 Cal. 63. *Vide* § 1000.

Subdivision 3.—7 Cal. 288.

Subdivision 4.—3 Cal. 427; 6 Cal. 488, 579; 12 Cal. 306; 13 Cal. 638; 25 Cal. 122; 27 Cal. 50, 238; 38 Cal. 216, 442.

§ 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

N. Y. C. C. P. § 1639; Or. C. C. P. § 682.

2 Cal. 37; 4 Cal. 356; 7 Cal. 262; 12 Cal. 168; 13 Cal. 116; 15 Cal. 44; 19 Cal. 354; 24 Cal. 411; 35 Cal. 336; 39 Cal. 169.

Mortgage. Pierce *v.* Robinson, 13 Cal. 116; 15 Cal. 287; 20 Cal. 126; 24 Cal. 385; 27 Cal. 603; 29 Cal. 18; 36 Cal. 28; 37 Cal. 452.

New Contract, 16 Cal. 138.

Consideration. *Vide* § 1962, 2.

Subdivision 1.—21 Cal. 122; 23 Cal. 121, 249; 29 Cal. 150.[4]

§ 1857. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place.

N. Y. C. C. P. § 1690; Or. C. C. P. § 683.

§ 1858. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

N. Y. C. C. P. § 1691; Or. C. C. P. § 684.

1 Cal. 162, 200; 5 Cal. 169; 6 Cal. 47; 22 Cal. 11; 24 Cal. 518; 26 Cal. 135; 28 Cal. 142; 31 Cal. 240, 412; 32 Cal. 499; 34 Cal. 183.

§ 1859. In the construction of a statute, the intention of the legislature, and in the construction of the instrument, the intention of the parties is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it.

N. Y. C. C. P. § 1692; Or. C. C. P. § 685.

10 Cal. 589; 11 Cal. 329; 15 Cal. 294; 22 Cal. 11; 30 Cal. 325; 32 Cal. 376; 34 Cal. 334; 36 Cal. 75, 595; 38 Cal. 572.

§ 1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

N. Y. C. C. P. § 1693; Or. C. C. P. § 686.

10 Cal. 95, 589; 11 Cal. 194; 13 Cal. 148; 13 Cal. 116; 15 Cal. 21; 18 Cal. 177; 22 Cal. 150, 476; 23 Cal. 339; 25 Cal. 440; 29 Cal. 299; 32 Cal. 11; 33 Cal. 202; 34 Cal. 334, 644; 36 Cal. 606; 38 Cal. 482.

Description of real property. *Vide* § 2077.

§ 1861. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

N. Y. C. C. P. § 1694; Or. C. C. P. § 687.
34 Cal. 624.

§ 1862. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

N. Y. C. C. P. § 1695; Or. C. C. P. § 688.

§ 1863. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters or who understand the language, is admissible to declare the characters or the meaning of the language.

N. Y. C. C. P. § 1696; Or. C. C. P. § 689.

§ 1864. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

N. Y. C. C. P. § 1697; Or. C. C. P. § 690.

§ 1865. A written notice, as well as every other writing, is to be constructed according to the ordinary acceptation of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment and the same refused, and that the holder looks for payment to the person to whom the notice is given.

N. Y. C. C. P. § 1698; Or. C. C. P. § 691.
4 Cal. 213; 8 Cal. 626; 14 Cal. 160; 24 Cal. 379.

§ 1866. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

N. Y. C. C. P. § 1699; Or. C. C. P. § 692.

§ 1867. None but a material allegation need be proved.

N. Y. C. C. P. § 1701; Or. C. C. P. § 693.
Vide § 471.

§ 1868. Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

N. Y. C. C. P. § 1702; Or. C. C. P. § 694.

§ 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

N. Y. C. C. P. § 1703; Or. C. C. P. § 695.

§ 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute.

2. The act, declaration or omission of a party, as evidence against such party.

3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto.

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal

actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death.

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.

7. The act, declaration or omission forming part of a transaction, as explained in section eighteen hundred and fifty.

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter.

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art or trade, when he is skilled therein.

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given.

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary.

12. Usage, to explain the true character of an act, contract or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits and the like, as evidence of pedigree.

14. The contents of a writing, when oral evidence thereof is admissible.

15. Any other facts from which the facts in issue are presumed or are logically inferable.

16. Such facts as serve to show the credibility of a witness, as explained in section eighteen hundred and forty-seven.

N. Y. C. C. P. § 1704; Or. C. C. P. § 696.

Subdivision 2.—3 Cal. 396; 5 Cal. 79; 9 Cal. 593; 22 Cal. 222; 23 Cal. 347; 26 Cal. 23; 34 Cal. 178; 35 Cal. 25, 373, 684; 38 Cal. 51; 39 Cal. 224. *Vide* § 2061, subdiv. 4. Estoppels. *Vide* § 1962.

Subdivision 3.—22 Cal. 231; 29 Cal. 637.

Subdivision 4.—Dying declarations, 10 Cal. 32; 17 Cal. 76, 166; 21 Cal. 368; 24 Cal. 17, 640; 35 Cal. 49.

Subdivision 5.—1 Cal. 221, 459; 2 Cal. 251; 14 Cal. 35; 23 Cal. 101, 152, 468; 36 Cal. 571; 39 Cal. 75; 40 Cal. 396.

Subdivision 8.—15 Cal. 275; 16 Cal. 423.

Subdivision 9.—Experts, 6 Cal. 108; 9 Cal. 56; 17 Cal. 416; 31 Cal. 115;

TITLE II.

OF THE KINDS AND DEGREES OF EVIDENCE.

CHAPTER I. KNOWLEDGE OF THE COURT.
II. WITNESSES.
III. WRITINGS.
IV. MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.
V. INDIRECT EVIDENCE.
VI. INDISPENSABLE EVIDENCE.
VII. CONCLUSIVE AND UNANSWERABLE EVIDENCE.

CHAPTER I.

KNOWLEDGE OF THE COURT.

SECTION 1875. Certain facts of general notoriety assumed to be true. Specification of such facts.

§ 1875. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.

6. The existence, title, national flag and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

N. Y. C. C. P. § 1706; Or. C. C. P. § 698.

Subdivision 3.—32 Cal. 447.

Subdivision 5.—15 Cal. 53; 32 Cal. 106.

Subdivision 8.—1 Cal. 9; 5 Cal. 140.

Stat. 1869-70, 862, requires the court to take "judicial cognizance" that any land within the limits of the city and county of San Francisco, lying east of a line commencing at Seal Rock, and running thence south to the southerly line of said city and county, is *prima facie* a part of the pueblo lands of said city, as confirmed by the decree of the U. S. Circuit Court, and is *prima facie* not among, or part or parcel of, any exceptions or reservations mentioned or contained in said decree. But nothing in said act is to be construed to prevent a party from showing affirmatively that any land is not included within the limits of the land so confirmed, or that the same is among, or part or parcel of, any exception or reservation.

CHAPTER II

WITNESSES.

SECTION 1878. Witnesses defined.
1879. All persons capable of perception and communication may be witnesses.
1880. Persons who cannot testify.
1881. Persons in certain relations to parties prohibited.
1882. When privileged persons must testify.
1883. Judge or a juror may be witness.
1884. When an interpreter to be sworn.

§ 1878. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

N. Y. C. C. P. § 1707; Or. C. C. P. § 699.

§ 1879. (§§ 391, 392.) All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witnesses may be drawn in question, as provided in section eighteen hundred and forty-seven.

N. Y. C. C. P. § 1708; Or. C. C. P. § 700.

Vide §§ 1847–2051.

Stat. 1863, 701, read: "§ 391. All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. *Facts which have heretofore caused the exclusion of testimony, may still be shown, for the purpose of affecting its credibility.*" Stat. 1851, 113: Omitted words in italics.

Stat. 1863, 701, read: § 392. "No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding as a party thereto, or otherwise; but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce*, or by deposition, or upon a commission, in the same manner and subject to the same rules of examination as any other witness, on behalf of himself, or either or any of the parties to the action or proceeding."

Stat. 1854, 66, read: "§ 392. No person offered as a witness shall be excluded on account of his opinions on matters of religious belief, nor shall any person be excluded on account of his interest in the event of the action or proceedings, except in the following cases:

First: When he is a party to the action or proceeding, or the action or proceeding is prosecuted or defended for his immediate benefit.

Second: When his interest is a present, certain and vested interest."

Stat. 1851, 113, read: "§ 392. No person offered as a witness shall be excluded by reason of his interest in the event of the action or proceeding; nor on account of opinions on matters of religious belief."

§ 1880. (§ 394.) The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

N. Y. C. C. P. § 1709; Or. C. C. P. § 701.

Stat. 1863, 60, inserted the words "in the opinion of the court" between "who" and "appear" in subdivision 2; also added two subdivisions as follows:

"*Third:* Mongolians, Chinese or Indians, or persons having one-half or more of Indian blood, in an action or proceeding wherein a white person is a party.

Fourth: Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the Governor, or such judgment has been reversed on appeal."

Stat. 1854, 66, was same as stat. 1863, omitting in subdivision three, the words, "Mongolians, Chinese or"; and inserting the words "and negroes or persons having one-half or more of negro blood."

Stat. 1851, 114, was same as § 1830, adding two subdivisions, as follows:

"3d. Indians, or persons having one-fourth or more of Indian blood, in an action or proceeding to which a white person is a party."

"4th. Negroes, or persons having one-half or more Negro blood, in an action or proceeding to which a white person is a party."

Subdivision 2.—10 Cal. 66.

§ 1881. (§§ 395, 396, 397, 398, 399.) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or pro-

ceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

N. Y. C. C. P. § 1710; Or. C. C. P. § 702.

Stat. 1863, 771, read: "§ 395. A husband may be a witness for or against his wife, and a wife may be a witness for or against her husband; and where husband and wife are parties to an action or proceeding, they, or either of them, may be examined as witnesses in their own behalf, or in behalf of each other, or in behalf of any of the parties thereto, the same as any other witnesses; but this section shall not apply to cases of divorce, neither shall any husband or wife be competent or compellable to disclose any communication made to him or her by the other during marriage."

Stat. 1865-6, 46, §1, read: "In all criminal actions, where the husband is the party accused, the wife shall be a competent witness; and when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife shall be compelled or allowed to testify in such cases, unless by consent of both of them; *provided*, that in cases of personal violence upon either by the other, the injured party (husband or wife) shall be allowed to testify against the other."

Stat. 1851, 114, § 395, was substantially the same as subdivision 1, omitting the words, "without his consent;" "without her consent;" "nor to a criminal action or proceeding for a crime committed by one against the other."

Stat. 1851, 114, § 396, was same as subdivision 2, inserting the words "or counsellor" after "attorney;" also the words, "as a witness" after "examined."

Stat. 1851, 114, § 397, was the same as subdivision 3, inserting the words, "as a witness" after "examined."

Stat. 1861, 305, § 398, was same as subdivision 4, inserting the words, "as a witness" instead of "in a civil action;" also adding the words, "provided, however, in any suit or prosecution against a physician, or surgeon, for malpractice, if the patient, or party suing or prosecuting, shall give such consent, and any such witness shall give testimony, then such physician

or surgeon defendant, may call any other physicians or surgeons as witnesses on behalf of defendant, without the consent of such patient, or party suing or prosecuting."

Stat. 1851, 114, § 398, was same as subdivision 4, inserting the words, "as a witness" instead of "in a civil action."

Stat. 1851, 114, § 399, was same as subdivision 5, inserting "as a witness" after "examined."

Subdivision 2.—5 Cal. 450; 23 Cal. 331; 29 Cal. 48; Satterlee v. Bliss, 36 Cal. 489; 40 Cal. 284

§ 1882. If a person offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician or surgeon on the same subject, within the meaning of the first four subdivisions of the last section.

N. Y. C. C. P. § 1711; Or. C. C. P. § 703.

§ 1883. (§ 400.) The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

§ 1884. (§ 401.) When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpœna. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of a contempt.

Stat. 1863, 495, same substantially, adding the words "and may be punished accordingly."

Stat. 1851, 114, omitted all except the first sentence.

CHAPTER III.

WRITINGS.

ARTICLE I. WRITINGS IN GENERAL.
II. PUBLIC WRITINGS.
III. PRIVATE WRITINGS.

ARTICLE I.

WRITINGS IN GENERAL.

SECTION 1887. Writings, public and private.
1888. Public writings defined.
1889. All others private.

§ 1887. Writings are of two kinds:

1. Public; and,
2. Private.

N. Y. C. C. P. § 1712; Or. C. C. P. § 704.

§ 1888. Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, whether of this state, of the United States, of a sister state or of a foreign country.

2. Public records, kept in this state, of private writings.

N. Y. C. C. P. § 1713; Or. C. C. P. § 705.

§ 1889. All other writings are private.

N. Y. C. C. P. § 1714; Or. C. C. P. § 706.

ARTICLE II.

PUBLIC WRITINGS.

1892. Every citizen entitled to inspect and copy public writings.
1893. Public officers bound to give copies
1894. Four kinds of public writings.
1895. Laws, written or unwritten.
1896. Written laws defined.
1897. Constitution and statutes.
1898. Public and private statutes defined.
1899. Unwritten law defined.
1900. Books containing laws presumed to be correct.
1901. Public seal authenticates a law or document.
1902. Other evidence of laws of other states.
1903. Recitals in statutes, how far evidence.
1904. Judicial record defined.
1905. Record, how authenticated as evidence.
1906. Record of a foreign country, how authenticated.
1907. Oral evidence of a foreign record.
1908. Effect of a judgment upon rights in various cases.
1909. Effect of other judicial orders, when conclusive.
1910. Where parties are to be deemed the same.
1911. What deemed adjudged in a judgment.
1912. Where sureties bound, principal is also.
1913. Record of another state, its effect.
1914. Record of a court of admiralty.
1915. Effect of a foreign judgment.
1916. Manner of impeaching a record.
1917. The jurisdiction necessary in a judgment.
1918. Manner of proving other official documents.
1919. Public record of private writing evidence.
1920. Entries in official books primary evidence.
1921. Justice's judgment in other states, how proved.
1922. Same.
1923. Contents of other official certificates.
1924. Provisions in relation to states apply to territories.
1925. Certificates of purchase primary evidence of ownership.
1926. Entries made by officers or boards primary evidence

§ 1892. Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

N. Y. C. C. P. § 1715; Or. C. C. P. § 707.

§ 1893. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is primary evidence of the original writing.

N. Y. C. C. P. § 1716; Or. C. C. P. § 708.

§ 1894. Public writings are divided into four classes:

1. Laws.
2. Judicial records.
3. Other official documents.
4. Public records, kept in this state, of private writings.

N. Y. C. C. P. § 1717; Or. C. C. P. § 709.

§ 1895. Laws, whether organic or ordinary, are either written or unwritten.

N. Y. C. C. P. § 1718; Or. C. C. P. § 710.

§ 1896. A written law is that which is promulgated in writing, and of which a record is in existence.

N. Y. C. C. P. § 1719; Or. C. C. P. § 711.

§ 1897. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this state is therefore contained in its constitution and statutes, and in the constitution and statutes of the United States.

N. Y. C. C. P. § 1720; Or. C. C. P. § 712.

§ 1898. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

N. Y. C. C. P. § 1721; Or. C. C. P. § 713.
32 Cal. 241.

§ 1899. Unwritten law is the law not promulgated and recorded, as mentioned in section eighteen hundred and ninety-six, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men.

N. Y. C. C. P. § 1722; Or. C. C. P. § 714.

§ 1900. (§ 453.) Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, code or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country, as evidence of the written law thereof, are admissible in this state as evidence of such law.

N. Y. C. C. P. § 1723; Or. C. C. P. § 715.

Stat. 1851, 123, § 453, read: "Printed copies, in volumes, of statutes, code, or other written law, enacted by any other state, or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the courts and judicial tribunals of such state, territory or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws."

§ 1901. The public seal of the state or country, affixed to a copy of the written law or other public writing, is also admissible as evidence of such law or writing.

N. Y. C. C. P. § 1724; Or. C. C. P. § 716.

§ 1902. The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state or country, or proved to be commonly admitted in such courts.

N. Y. C. C. P. § 1725; Or. C. C. P. § 717.

§ 1903. The recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

N. Y. C. C. P. § 1726; Or. C. C. P. § 718.

§ 1904. A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

N. Y. C. C. P. § 1727; Or. C. C. P. § 719.

§ 1905. (§§ 449, 450.) A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

Stat. 1851, 122, §§ 449-450, read: "§ 449. A judicial record of this state, or of the United States, may be proven by the production of the original, or by a copy thereof, certified by the clerk, or other person having the legal custody thereof, under the seal of the court, to be a true copy of such record."

§ 450. A judicial record of a sister state may be proved by the production of a copy thereof, certified by the clerk, or legal keeper of the record, under the seal of the court, to be a true copy of such record, together with the certificate of a judge of the court, that the person making the certificate is the clerk of the court, or legal keeper of the record, and in either case that the signature is genuine, and the certificate in due form."

Stat. 1854, 67, § 44, amending 1851, § 450, read: "The records and judicial proceedings of the courts of any other state of the United States, may be proved or admitted in the courts of this state, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."
See Or. C. C. P. § 720.

1 Cal. 428; 7 Cal. 247; 8 Cal. 449; 12 Cal. 181; 18 Cal. 41, 372, 416; 31 Cal. 500.

§ 1906. (§ 451.) A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court or the legal keeper of the record, and in either case, that the signature of such person is genuine. The signature of the chief judge, or presiding magistrate, must be authenticated according to the laws of the country, by the minister of justice

or the head of the department under whose authority the record is kept.

See Or. C. C. P. § 721.

Stat. 1851, 122, § 451, read: "A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal; or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record: together with a certificate of a judge of the court, that the person making the certificate is the clerk of the court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and also, together with the certificate of the minister or embassador of the United States, or of a consul of the United States, in such foreign country, that there is such a court, specifying generally the nature of its jurisdiction, and verifying the signature of the judge and clerk, or other legal keeper of the record."

§ 1907. (§ 452.) A copy of the judicial record of a foreign country is also admissible in evidence, upon proof—

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it.

2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of the court, by the signature of the legal keeper of the original.

N. Y. C. C. P. § 1730: Or. C. C. P. § 722.

§ 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commence-

ment of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

N. Y. C. C. P. § 1731; Or. C. C. P. § 723.
NOTE.—See sections 1913, 1914 and 1915.
Vide § 1962, Subdivision 6, and cases there cited.
As to jurisdiction, &c., *Vide* Hahn v. Kelley, 34 Cal. 391; 37 Cal. 458.

§ 1909. Other judicial orders of a court or judge of this state, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

N. Y. C. C. P. § 1732; Or. C. C. P. § 724.
Vide § 1962, Subdivision 6.

§ 1910. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

N. Y. C. C. P. § 1733; Or. C. C. P. § 725.
37 Cal. 389; 38 Cal. 259.

§ 1911. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

N. Y. C. C. P. § 1734; Or. C. C. P. § 726.
23 Cal. 354, 373; 30 Cal. 229, 309; 31 Cal. 148; 32 Cal. 176; 35 Cal. 316; 36 Cal. 230, 625; 37 Cal. 236.

§ 1912. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defense.

N. Y. C. C. P. § 1735; Or. C. C. P. § 727.
16 Cal. 69.

§ 1913. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

N. Y. C. C. P. § 1736; Or. C. C. P. § 728.
8 Cal. 443.

§ 1914. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

N. Y. C. C. P. § 1737; Or. C. C. P. § 729.

§ 1915. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

N. Y. C. C. P. § 1738; Or. C. C. P. § 730.

§ 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

N. Y. C. C. P. § 1739; Or. C. C. P. § 731.
7 Cal. 54, 443; 8 Cal. 562; 27 Cal. 300; 30 Cal. 439; 31 Cal. 273; 32 Cal. 176; 33 Cal. 505. Hahn *v.* Kelley, 34 Cal. 391; 35 Cal. 458.

§ 1917. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties and over the thing, when a specific thing is the subject of the judgment.

N. Y. C. C. P. § 1740; Or. C. C. P. § 732.

§ 1918. Other official documents may be proved, as follows:

1. Acts of the executive of this state, by the records of the state department of the state, and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the legislature or congress, or either house thereof.

2. The proceedings of the legislature of this state or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.

3. The acts of the executive or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation.

6. Documents of any other class in this state, by the original or by a copy certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original or by a copy certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior or county court, or mayor of the city of such state, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original or by a copy certified by the legal keeper thereof, with a certificate, under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified, by the officer having the legal custody of the original.

N. Y. C. C. P. § 1741; Or. C. C. P. § 733.

Stat. 1857, 104, read: "1. Whenever the public records, books or papers in the 'custody' of any collector of customs of the United States, or of the register or receiver of any land office of the United States within this state, or in the office of the surveyor general of the United States for the state of California, or in the office and in the custody of the clerk of the circuit, or any district court of the United States for the State of California, shall be required as evidence in any court of this state, copies of such records, books or papers, duly certified by the proper officer under his hand and official seal, where he has a seal, shall be received in evidence with the same force and effect as the originals."

Stat. 1857, 317, read: "1. Copies of all papers lately belonging to the United States board of commissioners for the settlement of private land claims of California, and on file in the office of the surveyor general of the United States for the state of California, and all copies of documents and papers belonging to said surveyor's office, which copies shall have been duly certified to be true copies by said surveyor, shall be received and read in evidence in the same manner and with like effect as the originals."

Stat. 1860, 272, §§ 1-2, read: "§ 1. Each and every grantee, present claimant, or owner, of any private land claim within this state, held under a grant from the Spanish or Mexican government, may file in the office of the county recorder in the county within whose boundaries the grant or land claim is situated, or in case the land be situated in two or more counties, then with the county recorder of each of said counties, a duly certified traced copy of the original expediente and grant.

§ 2. Upon filing said traced copies as aforesaid, the same shall be deemed and held to be notice and *prima facie* evidence of the existence and contents of the originals of such copies of such claims, and shall be received and accredited as such, in all the courts of this state."

§ 1919. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record.

N. Y. C. C. P. § 1742; Or. C. C. P. § 734.
Vide § 1918 and note.
Vide § 1937.

§ 1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are primary evidence of the facts stated therein.

N. Y. C. C. P. § 1743; Or. C. C. P. § 735.
6 Cal. 674; 31 Cal. 500.

§ 1921. A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

N. Y. C. C. P. § 1744; Or. C. C. P. § 736.

§ 1922. (§ 450.) There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness.

See N. Y. C. C. P. § 1745; Or. C. C. P. § 737.
Vide § 1905 and note.

§ 1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state that the copy has been compared by the certifying officer with the original, and is a correct transcript therefrom and of the whole of such original or of a specified part thereof. The official seal, if there be any, of the certifying officer, must also be affixed to the certificate, except when the certificate of a clerk of a court is used in the same court or before an officer thereof.

N. Y. C. C. P. § 1746; Or. C. C. P. § 738.

§ 1924. The provisions of the preceding sections of this

under whom he claims, or that the adverse party is holding the land for mining purposes.

Stat. 1859, 227. read: "The certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any of the laws of the United States, or of this state, shall be deemed *prima facie* evidence of legal title in the holder of said certificate of purchase, or location, or his assignees."

Stat. 1859, 332, (supplementary to, and explanatory of, stat. 1859, 227, *supra*,) read: "No certificate of purchase, or location, mentioned in the act to which this act is explanatory and supplemental, shall affect the right, title or possession of any party in adverse possession of any lands at the date of the location, or the date of filing a pre-emption claim, for which the certificate of purchase, or location, is issued; nor shall said certificate of purchase, or location, be so construed as to affect the working of mineral lands for mining purposes."

40 Cal. 373.

§ 1926. An entry made by an officer or board of officers, or under the direction and in the presence of either, in the course of official duty, is primary evidence of the facts stated in such entry.

ARTICLE III.

PRIVATE WRITINGS

SECTION 1929. Private writings classified.
1930. Seal defined.
1931. Manner of making it.
1932. Effect of a seal.
1933. Execution of an instrument defined.
1934. Compromise of a debt without seal good.
1935. Subscribing witness defined.
1936. Books, maps, etc., how far evidence.
1937. Original writing to be produced or accounted for.
1938. When in possession of adverse party, notice to be given.
1939. Writings called for and inspected may be withheld.
1940. Where there is a subscribing witness, the proof.
1941. Other witnesses may also testify.
1942. When evidence of execution not necessary.
1943. Evidence of handwriting.
1944. Allowed by comparison.
1945. Same.
1946. Entries of decedent's evidence in specified cases.
1947. Copies of entries also allowed.
1948. Private writings acknowledged and certified.
1949. County clerks to keep private papers deposited.
1950. Public records not to be carried about.

§ 1929. Private writings are either—

1. Sealed; or,
2. Unsealed.

N. Y. C. C. P. § 1748; Or. C. C. P. § 740.

§ 1930. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument.

N. Y. C. C. P. § 1749; Or. C. C. P. § 741.

§ 1931. A public seal in this state is a stamp or impression made upon wax, wafer, paper, or any other substance upon which a visible and permanent impression can be made. A private seal may be in the same manner, or it may be made without an impression, by a wafer or wax attached to the instru-

ment, or by a paper attached to it by an adhesive substance. A scroll or other sign made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this state.

See N. Y. C. C. P. § 1750; Or. C. C. P. § 742.

Vide § 14 of this code.

Stat. 1851, 123, read: "a seal of a court or public office, when required to any writ or process, or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone."

5 Cal. 220, 315, 467; 13 Cal. 220, 510; 15 Cal. 363; 16 Cal. 165, 638.

§ 1932. The seal affixed to a writing is presumptive evidence of a consideration. In other respects there is no difference between sealed and unsealed writings. A writing under seal may therefore be changed or altogether discharged by a writing not under seal, or by an oral agreement otherwise valid.

N. Y. C. C. P. § 1751; see Or. C. C. P. § 743.

6 Cal. 134, 664; 10 Cal. 461; 12 Cal. 286, 564; 13 Cal. 33.

§ 1933. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

N. Y. C. C. P. § 1752; Or. C. C. P. § 744.

13 Cal. 502.

§ 1934. An agreement in writing without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

N. Y. C. C. P. § 1753; Or. C. C. P. § 745.

Stat. 1867-8, 31, read; "By agreement between creditor and debtor, a less sum than the whole amount may be paid and received in full payment and discharge of any indebtedness, if such agreement be clearly manifested by a receipt or instrument, in writing, signed by such creditor."

§ 1935. A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

N. Y. C. C. P. § 1755; Or. C. C. P. § 747.

§ 1936. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest.

N. Y. C. C. P. § 1756; Or. C. C. P. § 745.

§ 1937. The original writing must be produced and proved, except as provided in sections eighteen hundred and fifty-five and nineteen hundred and nineteen. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in section eighteen hundred and fifty five.

N. Y. C. C. P. § 1757; Or. C. C. P. § 749.
Vide § 1855 this code.
Vide § 1855, and cases there cited.

§ 1938. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

N. Y. C. C. P. § 1758; Or. C. C. P. § 749.
Vide § 1855 this code.
Vide § 1855, subdivision 2.

§ 1939. Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

N. Y. C. C. P. § 1759; Or. C. C. P. § 750.

§ 1940. If there be a subscribing witness to a writing produced in evidence, its execution must be proved by him, if he is within reach of a subpœna and can be produced and can testify. If there be more than one subscribing witness, the evidence of one is sufficient. If the subscribing witnesses can not be produced, the execution may be proved by the party who executed it, or by proof of his handwriting.

See N. Y. C. C. P. § 1760; and Or. C. C. P. § 751.
3 Cal. 427; 12 Cal. 306, 426; 14 Cal. 19; 26 Cal. 393; 27 Cal. 238.

§ 1941. If the subscribing witness denies or does not recol-

lect the execution of the writing, its execution may still be proved by other evidence.

N. Y. C. C. P. § 1761; Or. C. C. P. § 752.

§ 1943. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section nineteen hundred and forty five, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

N. Y. C. C. P. § 1762; Or. C. C. P. § 753.

§ 1943. The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

N. Y. C. C. P. § 1763; Or. C. C. P § 754.

§ 1944. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered.

N. Y. C. C. P. § 1764; Or. C. C. P. § 755.

§ 1945. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

N. Y. C. C. P. § 1765; Or. C. C. P. § 756 reads twenty years.

§ 1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as primary evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it.

2. When it was made in a professional capacity and in the ordinary course of professional conduct.

3. When it was made in the performance of a duty specially enjoined by law.

N. Y. C. C. P. § 1766; Or. C. C. P. § 757.

§ 1947. When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals.

N. Y. C. C. P. § 1767; Or. C. C. P. § 758.
14 Cal. 573.

§ 1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgement or proof of conveyances of real property, and the certificate of such acknowledgment or proof is primary evidence of the execution of the writing, in the same manner as if it were a conveyance of real property.

N. Y. C. C. P. § 1768.

§ 1949. Every county recorder must receive and file in his office any private writing delivered to him for that purpose, and give a written receipt therefor. Such writing must be properly indorsed so as to indicate its general nature, and the names of the parties thereto, and the time of filing, and must be deposited and kept in such office, separate from other papers. It is then subject to the examination of any person, but cannot be withdrawn, except temporarily, upon the written order of the depositor or or his legal representatives, or on the order of a court of record, for the purpose of being read in evidence therein.

N. Y. C. C. P. § 1769.

§ 1950. The record of a conveyance of real property, or other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, or when temporarily removed by the clerk having it in custody to the court of which he is clerk, or to courts held in the city or town where his office is situated.

N. Y. C. C. P. § 1772.

CHAPTER IV.

MATERIAL-OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

SECTION 1954. Material objects.

§ 1954. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

N. Y. C. C. P. § 1773; Or. C. C. P. § 759.

CHAPTER V.

INDIRECT EVIDENCE, INFERENCES AND PRESUMPTIONS.

SECTION 1957. Indirect evidence classified.
1958. Inference defined.
1959. Presumption defined.
1960. When an inference arises.
1961. Presumptions may be controverted, when.
1962. Specification of conclusive presumptions.
1963. All other presumptions may be controverted.

§ 1957. Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

N. Y. C. C. P. § 1774; Or. C. C. P. § 760.

§ 1958. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

N. Y. C. C. P. § 1775; Or. C. C. P. § 761.

§ 1959. A presumption is a deduction which the law expressly directs to be made from particular facts.

N. Y. C. C. P. § 1776; Or. C. C. P § 762.

§ 1960. An inference must be founded—

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

N. Y. C. C. P. § 1777; Or. C. C. P. § 763.

§ 1961. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption.

N. Y. C. C. P. § 1778; Or. C. C. P. § 764.

§ 1962. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive.

See N. Y. C. C. P. § 1770; Or. C. C. P. § 765.

Vide § 1908.

Subdivision 2.—3 Cal. 263; 6 Cal. 149; 7 Cal. 551; 12 Cal. 20; 14 Cal. 472, 612; 16 Cal. 160; 22 Cal. 224, 580; 23 Cal. 354; 28 Cal. 175; 30 Cal. 560; 36 Cal. 362.

Consideration. 6 Cal. 134; 21 Cal. 47; 23 Cal. 472; 26 Cal. 79, 455; 27 Cal. 119; 30 Cal. 11; 31 Cal. 471; 36 Cal. 362.

Grantee may deny grantor's title. 13 Cal. 494; 14 Cal. 472; 16 Cal. 100; 18 Cal. 465.

Subdivision 3.—Estoppel *in pais*. What constitutes. 2 Cal. 489; 3 Cal. 302; 4 Cal. 97, 300; 5 Cal. 84, 363, 607; 8 Cal. 27, 77, 113, 303 451; 9 Cal. 204, 600; 10 Cal. 172; 12 Cal. 143; 13 Cal. 359. Boggs *v.* Merced Mining Co., 14 Cal. 279; 16 Cal. 345, 521; 23 Cal. 11; 24 Cal. 268; 25 Cal. 545, 563; 26 Cal. 23; Davis *v.* Davis, 30 Cal. 403; 31 Cal. 148; 36 Cal. 94; 38 Cal. 360.

What does not constitute. 3 Cal. 490; 6 Cal. 232, 561; 10 Cal. 90, 172, 589; 13 Cal. 4 4; 17 Cal. 401; 22 Cal. 468; 24 Cal. 268; 25 Cal. 147; 26 Cal. 23; Davis *v.* Davis, 23 Cal. 175; 31 Cal. 218; 36 Cal. 535; 37 Cal. 40; 38 Cal. 119, 300, 428; 40 Cal. 429.

Vide estoppels by pleadings, *post*.

Subdivision 4.—1 Cal. 119; 8 Cal. 398, 581; 11 Cal. 133; 33 Cal. 227; 35 Cal. 558.

Subdivision 6.—14 Cal. 634; 23 Cal. 354, 373; 27 Cal. 228; 30 Cal. 229, 301, 309, 360, 630; 31 Cal. 14[illegible]; 32 [illegible]al. 17[illegible]; 33 Cal. 74, 448; 34 Cal. 265; 36 Cal. 28, 230, 489; 37 Cal. 236, 389; 38 Cal. 259, 590; 39 Cal. 473; 40 Cal. 246, 284, 294 *Vide* §§ 1908, 1911.

Estoppel by pleadings. 12 Cal. 191; 27 Cal. 228; 30 Cal. 360; 37 Cal. 34.

§ 1963. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.

2. That an unlawful act was done with an unlawful intent.

3. That a person intends the ordinary consequence of his voluntary act.

4. That a person takes ordinary care of his own concerns.

5. That evidence willfully suppressed would be adverse if produced.

6. That higher evidence would be adverse from inferior being produced.

7. That money paid by one to another was due to the latter.

8. That a thing delivered by one to another belonged to the latter.

9. That an obligation delivered up to the debtor has been paid.

10. That former rent or installments have been paid when a receipt for later is produced.

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.

13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.

14. That a person acting in a public office was regularly appointed to it.

15. That official duty has been regularly performed.

16. That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties

18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.

19. That private transactions have been fair and regular.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed was received in the regular course of the mail.

25. Identity of person from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

28. That things have happened according to the ordinary course of nature and the ordinary habits of life.

29. That persons acting as copartners have entered into a contract of copartnership.

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

32. That a thing once proved to exist continues as long as is usual with things of that nature.

33. That the law has been obeyed.

34. That a document or writing more than thirty years old, is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published.

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the state or country

where the book is published, contains correct reports of such cases.

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

39. That there was a good and sufficient consideration for a written contract.

40. When two persons perish in the same calamity, such as a wreck, a battle or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age and sex, according to the following rules:

First—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived.

Second—If both were above the age of sixty, the younger is presumed to have survived.

Third—If one be under fifteen and the other above sixty, the former is presumed to have survived.

Fourth—If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth—If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

See N. Y. C. C. P. § 1780; and Or. C. C. P. § 768.

CHAPTER VI.

INDISPENSABLE EVIDENCE.

SECTION 1967. Indispensable evidence, what.
1968. To prove usage, perjury and treason, more than one witness required.
1969. Will to be in writing.
1970. How revoked.
1971. Transfer of real property to be in writing.
1972. Last section not to extend to certain cases.
1973. Agreement not in writing, when invalid.
1974. Representation of credit by writing.

§ 1967. The law makes certain evidence necessary to the validity of particular acts or the proof of particular facts.

N. Y. C. C. P. § 1781; Or. C. C. P. § 767.

§ 1968. Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

See N. Y. C. C. P. § 1782; and Or. C. C. P. § 768.

§ 1969. A last will and testament, except when made by a soldier in actual military service, or by a mariner at sea, is invalid, unless it be in writing and executed with such formalities as are required by law. Evidence, therefore, of such will cannot be received without the written instrument itself, or secondary evidence of its contents in the cases prescribed by law.

N. Y. C. C. P. § 1783; Or. C. C. P. § 769.

§ 1970. A written will cannot be revoked or altered otherwise than by another written will or another writing of the testator, declaring such revocation or alteration, and executed with the same formalities required by law for the will itself; or unless the will be burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the

direction and consent of the testator and the fact of such injury or destruction must be proved by at least two witnesses.

N. Y. C. C. P. § 1784; Or. C. C. P. § 770.

Stat. 1850, 177, § 10 substantially the same, adding a provision that nothing therein contained should prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator.

§ 1971. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

See N. Y. C. C. P. § 1735; and Or. C. C. P. § 771.

2 Cal. 524, 603; 13 Cal. 133; 21 Cal. 389, 609; 22 Cal. 575; 30 Cal. 481; 35 Cal. 481; 38 Cal. 111. *Vide* § 1973, 5.

§ 1972. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

N. Y. C. C. P. § 1786; Or. C. C. P. § 772.

Trusts. 21 Cal. 92; 22 Cal. 575; 27 Cal. 119; 35 Cal. 481; 36 Cal. 94.

Part performance. 1 Cal. 119, 207; 10 Cal. 150; 19 Cal. 447.

§ 1973. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of the civil code.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars, unless the buyer accept or receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of sale, the price and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

5. An agreement for the leasing for a longer period than one year, or for the sale of real property or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

See N. Y. C. C. P. § 1739; Or. C. C. P. § 775.

Subdivision 2.—3 Cal. 156, 460, 485; 5 Cal. 285; 6 Cal. 102; 7 Cal. 33; 9 Cal. 328; 12 Cal. 236, 311, 542; 18 Cal. 622; 22 Cal. 187; 27 Cal. 80; 29 Cal. 150; 33 Cal. 121; 34 Cal. 673; 37 Cal. 534; 38 Cal. 133.

Subdivision 4.—1 Cal. 181, 415; 3 Cal. 140; 22 Cal. 103, 539.

Subdivision 5.—1 Cal. 98, 119; 2 Cal. 430; 4 Cal. 50, 315; 6 Cal. 75; 9 Cal. 181, 338; 21 Cal. 171; 37 Cal. 250, 529, 634; 38 Cal. 99; 39 Cal. 109, 639. *Vide* § 1971.

§ 1974. No evidence is admissible to charge a person upon representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

N. Y. C. C. P. § 1790; Or. C. C. P. § 776.

CHAPTER VII.

CONCLUSIVE OR UNANSWERABLE EVIDENCE.

SECTION 1978. Conclusive or unanswerable evidence.

§ 1978. No evidence is by law made conclusive or unanswerable, unless so declared by this code.

N. Y. C. C. P. § 1792.

TITLE III.

OF THE PRODUCTION OF EVIDENCE.

CHAPTER I. BY WHOM TO BE PRODUCED.
II. MEANS OF PRODUCTION.
III. MANNER OF PRODUCTION.

CHAPTER I.

BY WHOM TO BE PRODUCED.

SECTION 1981. Evidence to be produced, by whom.
1982. Writing altered, who to explain.

§ 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

N. Y. C. C. P. § 1793; Or. C. C. P. § 777.
8 Cal. 31; 15 Cal. 99; 26 Cal. 606. *Vide* § 2061, subdivision 5.

§ 1982. (§ 448.) The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, *or that the alteration did not change the meaning or language of the instrument.* If he do that, he may give the writing in evidence, but not otherwise.

N. Y. C. C. P. § 1794; Or. C. C. P. § 778.

Stat. 1851, 122, inserted the words, "and such alteration is not noted on the writing," between "dispute" and "must account;" also omitted words in italics.

CHAPTER II.

MEANS OF PRODUCTION.

SECTION 1985. Subpœna for witness defined.
1986. Subpœna, how issued.
1987. Subpœna, how served.
1988. How, if witness be concealed.
1989. When a witness is compelled to attend.
1990. Person present compelled to testify.
1991. Disobedience, how punished.
1992. Forfeiture therefor.
1993. Warrant may issue to bring witness, when.
1994. Contents of warrant.
1995. If witness be a prisoner, how brought.
1996. On whose motion.
1997. How examined.

§ 1985. (§ 402.) The process by which the attendance of a witness is required is a subpœna. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents or other things under his control which he is bound by law to produce in evidence.

N. Y. C. C. P. § 1795; Or. C. C. P. § 779.

Stat. 1855, 197, read; "A subpœna may require not only the attendance of the person to whom it is directed, at a particular time and place, to testify as a witness, but may also require him to bring any books, documents, or other things under his control, to be used as evidence. No person shall be required to attend as a witness before any court, judge, justice, or any other officer out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial."

Stat. 1851, 115, substantially same as stat. 1855, omitting the last clause beginning with the word "unless."

§ 1986. (§ 403.) The subpœna is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending.

2. To require attendance out of the court, before a judge, justice or other officer authorized to administer oaths or take testi-

mony in any matter under the laws of this state, it is issued by the judge, justice or any other officer before whom the attendance is required.

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction; with like power to enforce attendance, and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpœna directed the attendance of the witness before their courts in a matter pending therein.

See N. Y. C. C. P. § 1797; and Or. C. C. P. § 780.

Stat. 1865–6, 708.

Stat. 1859, 218, inserted in subdivision 1, the words, "in the name and" between "issued" and "under"; also omitted from subdivision 3, the words, "or before any officer or officers empowered by the laws of the United States to take testimony."

Stat. 1851, 115, was same as stat. 1859, inserting instead of subdivision 3, the words: "3d. To require attendance before a commissioner appointed to take testimony by a court of any other state or county, it may be issued by any judge or justice of the peace, in places within their respective jurisdictions."

§ 1987. (§ 404.) The service of a subpœna is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. *The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.* Such service may be made by any person.

See Or. C. C. P. § 782.

§ 1988. (§ 405.) If a witness is concealed in a building or vessel, so as to prevent the service of a subpœna upon him, any court or judge, or any officer issuing the subpœna, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpœna; and the sheriff must serve it accordingly, and for

that purpose may break into the building or vessel where the witness is concealed.

See Or. C. C. P. § 783.

§ 1989. (§ 402.) A witness is not obliged to attend as a witness before any court, judge, justice or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

See Or. C. C. P. § 785.
Vide § 1985 and note.

§ 1990. (§ 406.) A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpœna issued by such court or officer.

Or. C. C. P. § 786.

§ 1991. (§ 409.) Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpœna or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out.

Or. C. C. P. § 787.
Stat. 1851, 116, read: "His complaint may be dismissed or his answer stricken out."
35 Cal. 96.

§ 1992. (§ 410.) A witness disobeying a subpœna also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

Or. C. C. P. § 788 reads fifty dollars.

§ 1993. (§ 411.) In case of failure of a witness to attend, the court or officer issuing the subpœna, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

Or. C. C. P. § 789.

§ 1994. Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the district court.

N. Y. C. C. P. § 1805; Or. C. C. P. § 790.

§ 1995. (§ 412.) If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made, as follows:

1. By the court itself in which the action or special proceeding is pending, *unless it be a justice's court.*

2. By a justice of the supreme court, judge of the district court, or county judge of the county where the action or proceeding is pending, if pending *before a justice's court or* before a judge or other person out of court.

See Or. C. C. P. § 791.

Stat. 1851, 116, inserted the words, "for any other cause than a sentence for felony" between "state" and an "order."

§ 1996. (§ 413.) Such order can only be made *on the motion of a party*, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

§ 1997. (§ 414.) If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

Stat. 1851, 116, inserted the words, "and for a cause other than a sentence for felony," between "pending" and "his production."

CHAPTER III.

MANNER OF PRODUCTION.

ARTICLE I. MODE OF TAKING THE TESTIMONY OF WITNESSES.
II. AFFIDAVITS.
III. DEPOSITIONS.
IV. MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.
V. MANNER OF TAKING DEPOSITIONS IN THE STATE.
VI. GENERAL RULES OF EXAMINATION.

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

SECTION 2002. Testimony, in what mode taken.
2003. Affidavit defined.
2004. A deposition defined.
2005. Oral examination defined.
2006. Deposition, how taken.

§ 2002. The testimony of witnesses is taken in three modes:

1. By affidavit.
2. By deposition.
3. By oral examination.

N. Y. C. C. P. § 1809; Or. C. C. P. § 792.

§ 2003. An affidavit is a written declaration under oath, made without notice to the adverse party.

N. Y. C. C. P. § 1810; Or. C. C. P. § 793.

§ 2004. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

N. Y. C. C. P. § 1811; Or. C. C. P. § 794.

§ 2005. An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

N. Y. C. C. P. § 1812; Or. C. C. P. § 795.

§ 2006. Depositions must be taken in the form of question and answer, and the words of the witness must be written down, unless the parties agree to a different mode.

N. Y. C. C. P. § 1813; Or. C. C. P. § 796.

ARTICLE II.

AFFIDAVITS.

SECTION 2009. Affidavits and depositions, how taken.
2010. Evidence of publication, what.
2011. Where filed.
2012. Affidavits to be used in this state, before whom may be taken in this state.
2013. If made in another state of the United States, before whom taken.
2014. If made in a foreign country, before whom taken.
2015. Certificate of the clerk, if taken before a judge of a court out of this state.

§ 2009. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this code.

N. Y. C. C. P. § 1815; See Or. C. C. P. §§ 798 799.

§ 2010. Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

N. Y. C. C. P. § 1817; Or. C. C. P. § 800.
37 Cal. 458.

§ 2011. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case the original affidavit, or a copy thereof certified by the court or clerk having it in custody, is primary evidence of the facts stated therein.

N. Y. C. C. P. § 1818; Or. C. C. P. § 801.

§ 2012. (§ 424.) An affidavit to be used before any court, judge or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this state.

15 Cal. 53.

§ 2013. (§ 425.) An affidavit taken in another state of the United States, to be used in this state, must be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any judge of a court of record having a seal.

§ 2014. (§ 426.) An affidavit taken in a foreign country, to be used in this state, must be taken before an ambassador, minister consul, or vice-consul of the United States, or before any judge of a court of record having a seal in such foreign country.

§ 2015. (§ 427.) When an affidavit is taken before a judge of a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

ARTICLE III.

DEPOSITIONS.

)N 2019. Deposition, when used.
2020. Testimony of a witness out of the state, when taken.
2021. In the state, when taken.

)19. In all cases other than those mentioned in section ousand and nine, where a written declaration under oath], it must be a deposition as prescribed by this code.

. C. C. P. § 1819; Or. C. C. P. § 802.

020. (§ 432.) The testimony of a witness out of the may be taken by deposition, in an action, at any time after rvice of the summons or the appearance of the defendant; n a special proceeding, at any time after a question of fact isen therein.

C. C. P. § 803.

)021. (§ 428.) The testimony of a witness in this state be taken by deposition, in an action, at any time after the ce of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness resides out of the county in which his testimony is to be used.

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. *When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.*

See Or. C. C. P. § 804.
2 Cal. 25, 383; 29 Cal. 619.

ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

SECTION 2024. Testimony of witness out of state taken upon commission issued under seal, upon notice. To whom to issue.
2025. Proper interrogatories may be prepared, or may be waived by the parties.
2026. Authorities and duties of commissioner
2027. Trial, when postponed for reason of non-return of commission.
2028. Deposition, by whom used.

§ 2024. (§ 433.) The deposition of a witness out of this state may be taken upon commission, issued from the court, under the seal of the court, upon an order of the judge or court, or county judge, on the application of either party, upon five days previous notice to the other. It must be issued to a person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace, or commissioner, selected by the officer issuing it.

Or. C. C. P. §§ 806, 807.

Stat. 1851, 119, read: "any judge or justice of the peace selected by the officer granting the commission, or to a commissioner appointed by the governor of this state to take affidavits and depositions in other states."

27 Cal. 377.

§ 2025. (§ 434.) Such proper interrogatories, direct and cross, as the respective parties may prepare to be settled, or if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

Or. C. C. P. § 808.

§ 2026. (§ 435.) The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed

envelope, directed to the clerk or other persons designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Or. C. C. P. § 809.
27 Cal. 372.

§ 2027. (§ 436.) A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

Or. C. C. P. § 810.
2 Cal. 598.

§ 2028. The deposition mentioned in this article may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice, subject to all just exceptions.

N. Y. C. C. P. § 1828.

ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THIS STATE.

SECTION 2031. Depositions may be taken before a judge, etc., upon notice to the adverse party.
2032. Manner of taking depositions. May be used by either party on the trial.
2033. When deposition excluded.
2034. A deposition once taken may be read at any time.
2035. Deposition in this state to be used in other states.
2036. How to procure witness upon commission.
2037. How, if no commission.
2038. Deposition, how taken.

§ 2031. (§ 429.) Either party may have the deposition taken of a witness in this state, in either of the cases mentioned in section two thousand and twenty-one, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.

See Or. C. C. P. § 811.

Stat. 1859, 218, read: "Or clerk, or any justice of the peace, or notary public in this state," instead of "or officer authorized to administer oaths;" also inserted between "that section" and "such notice" the words: "*At any time during the forty days, immediately after the service of the summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, the notice required by this section may be served on the clerk of the court where the action is pending.*

Stat. 1851, 118, was same as stat. 1859 omitting the last words inserted *supra*.

2 Cal. 383; 3 Cal. 94; 5 Cal. 444; 6 Cal. 559; 9 Cal. 68; 17 Cal. 37.

§ 2032. (§ 430.) Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must

then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions two, three and four, of section two thousand and twenty-one, proof must be made at the trial that the witness continues absent or infirm, *or is dead.* The deposition thus taken may be also read in case of the death of the witness.

Stat. 1851. 119, inserted the words: "by affidavit or oral testimony," between "proof," and "must be made at the trial."

2 Cal. 383; 3 Cal. 94; 6 Cal. 17, 559; 9 Cal. 68; 14 Cal. 542; 18 Cal. 330; 19 Cal. 683; 22 Cal. 42; 27 Cal. 373.

§ 2033. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

N. Y. C. C. P. § 1881.

§ 2034. (§ 431.) When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, *or in any other action between the same parties upon the same subject,* and is then deemed the evidence of the party reading it.

Or. C. C. P. § 815.

8 Cal. 575; 14 Cal. 542.

§ 2035. Any party to an action or special proceeding in a court, or before a judge, of a sister state, may obtain the testimony of a witness residing in this state, to be used in such action or proceeding, in the cases mentioned in the next two sections.

N. Y. C. C. P. § 1833

§ 2036. If a commission to take such testimony has been issued from the court or judge before whom such action or proceeding is pending, on producing the commission to a district or a county judge, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpœna to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place.

N. Y. C. C. P. § 1834.

§ 2037. If a commission has not been issued, and it appears to a district (or) county judge or justice, by affidavit satisfactory to him—

1. That the testimony of the witness is material to either party.

2. That a commission to take the testimony of such witness has not been issued.

3. That, according to the law of the state where the action or special proceeding is pending, the deposition of a witness taken under such circumstance, and before such judge or justice, will be received in the action or proceeding—

He must issue his subpœna, requiring the witness to appear and testify before him at a specified time and place.

N. Y. C. C. P. § 1835.

§ 2038. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state requires.

N. Y. C. C. P. § 1836.

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

SECTION 2042. Order of proof, how regulated.
2043. Witnesses not under examination may be excluded.
2044. Court may control mode of interrogation.
2045. Direct and cross-examination defined.
2046. Leading question defined.
2047. When witness may refresh memory from notes.
2048. Cross-examination, as to what.
2049. Party producing not allowed to lead witness.
2050. Witness, how examined. When re-examined.
2051. How impeached.
2052. Same.
2053. Evidence of good character, when allowed.
2054. Writing shown to witness may be inspected by adverse party.

§ 2042. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

N. Y. C. C. P. § 1837; Or. C. C. P. § 820.

5 Cal. 137; 6 Cal. 170; 8 Cal. 49; 15 Cal. 199; 26 Cal. 606; 27 Cal. 248; 33 Cal. 608; 37 Cal. 438.

Vide §§ 2045, 2050.

§ 2043. If either party requires it, the judge may exclude from the court-room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

N. Y. C. C. P. § 1838; Or. C. C. P. § 821.

§ 2044. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness and as effective for the extraction of the truth as may be; but subject to this rule—the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon any

particular point when the evidence upon it is already so full as to preclude reasonable doubt.

N. Y. C. C. P. § 1840; Or. C. C. P. § 823.
Vide §§ 2065, 2066.

§ 2045. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

N. Y. C. C. P. § 1841; Or. C. C. P. § 824.
Vide § 2042.

§ 2046. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

N. Y. C. C. P. § 1842; Or. C. C. P. § 825.

§ 2047. A witness is allowed to refresh his memory respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. But in such case, the writing must be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

N. Y. C. C. P. § 1843; Or. C. C. P. § 826.

§ 2048. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.

N. Y. C. C. P. § 1844; Or. C. C. P. § 827.
5 Cal. 450; 14 Cal. 18; 25 Cal. 212; 33 Cal. 99, 641; 36 Cal. 223.

§ 2049. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two.

N. Y. C. C. P. § 1845; Or. C. C. P. § 822.
30 Cal. 394.

§ 2050. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

N. Y. C. C. P. § 1846; Or. C. C. P. § 829.
Vide § 2042.

§ 2051. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

N. Y. C. C. P. § 1847; Or. C. C. P. § 830; stats. 1867-8, p. 193-4.
Vide §§ 1847-1879 and note.
12 Cal. 306; 27 Cal. 630; 39 Cal. 614, 697. *Vide* § 1847

§ 2052. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

N. Y. C. C. P. § 1848; Or. C. C. P. § 831.
2 Cal. 326; 16 Cal. 173, 222; 25 Cal. 587; 29 Cal. 492. *Vide* § 1847.

§ 2053. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until

the character of such party or witness has been impeached, or unless the issue involves his character.

N. Y. C. C. P. § 1849; Or. C. C. P. § 832.
27 Cal. 300.

§ 2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

N. Y. C. C. P. § 1850; Or. C. C. P. § 833.

TITLE IV.

OF THE EFFECT OF EVIDENCE.

SECTION 2061. Jury judges of effect of evidence, but to be instructed on certain points.

§ 2061. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions—

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.

3. That a witness false in one part of his testimony is to be distrusted in others.

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt,

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

N. Y. C. C. P. § 1852; Or. C. C. P. § 835.

8 Cal. 216; 9 Cal. 565; 12 Cal. 500; 17 Cal. 166; 32 Cal. 213; 34 Cal. 663; 40 Cal. 272.

Vide §§ 606, 2102.

Subdivision 2.—15 Cal. 638: 38 Cal. 57.

Subdivision 4.—*Vide* § 1870, 2 & 3.

Subdivision 5.—*Vide* § 1961.

Subdivision 7.—5 Cal. 249: 9 Cal. 430.

TITLE V.

OF THE RIGHTS AND DUTIES OF WITNESSES.

SECTION 2064. Witnesses bound to attend when subpœnaed.
2065. Witnesses bound to answer questions.
2066. Right of witnesses to protection.
2067. Witnesses protected from arrest when attending, or going or returning.
2068. Arrest to be made void, and party making arrest liable, etc.
2069. To make affidavit if arrested.
2070. Court to discharge witness from arrest.

§ 2064. (§ 407.) A witness, served with a subpœna, must attend at the time appointed, with any papers under his control required by the subpœna, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

See Or. C. C. P. § 836.
14 Cal. 18; 33 Cal. 641; 36 Cal. 222.

§ 2065. (§ 408.) A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

Or. C. C. P. § 837.
7 Cal. 184; 35 Cal. 89; 39 Cal. 449.

§ 2066. It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

N. Y. C. C. P. § 1855; Or. C. C. P. § 838.

§ 2067. (§ 415.) Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

6 Cal. 32.

§ 2068. (§ 416.) The arrest of a witness, contrary to the preceding section, is void, *and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpœna, for the damages sustained by him in consequence of the arrest.*

N. Y. C. C. P. § 1856; Or. C. C. P. § 839.

§ 2069. (§ 416.) An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating—

1. That he has been served with a subpœna to attend as a witness before a court, officer or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpœna was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest.

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpœna.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

See Or. C. C. P. § 840.

§ 2070. The court or officer issuing the subpœna, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section

two thousand and sixty-seven. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court or a county judge may grant the discharge.

N. Y. C. C. P. § 1208; Or. C. C. P. § 261.

TITLE VI.

OF EVIDENCE IN PARTICULAR CASES, AND MISCELLANEOUS AND GENERAL PROVISIONS.

CHAPTER I. EVIDENCE IN PARTICULAR CASES.
II. PROCEEDINGS TO PERPETUATE TESTIMONY.
III. ADMINISTRATION OF OATHS AND AFFIRMATIONS.
IV. GENERAL PROVISIONS.

CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

SECTION 2074. An offer equivalent to payment.
2075. Whoever pays entitled to receipt.
2076. Objections to tender must be specified.
2077. Rules for construing description of lands.
2078. Compromise offer of no avail.
2079. In action for divorce, admission not sufficient.

§ 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.

N. Y. C. C. P. § 1859; Or. C. C. P. § 842.

1 Cal. 337; 5 Cal. 339; 14 Cal. 519; 15 Cal. 206, 376; 25 Cal. 502; 26 Cal. 565; 32 Cal. 163; 34 Cal. 616, 666.

§ 2075. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

N. Y. C. C. P. § 1860; Or. C. C. § 843.

§ 2076. The person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires, or be precluded from objecting afterwards.

N. Y. C. C. P. § 1861; Or. C. C. P. § 844.

§ 2077. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or bed of the stream is held under another title.

5. When tide water is the boundary, the rights of the grantor to low water mark are included in the conveyance.

6. When the description refers to a map and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

N. Y. C. C. P. § 1862; Or. C. C. P. § 845.

10 Cal. 589; Ferris v. Coover, 24 Cal. 435; 25 Cal. 296, 440; 29 Cal. 386; 30 Cal. 468; 34 Cal. 334; 36 Cal. 122, 606; 37 Cal. 432. *Vide* § 1860.

Subdivision 1.—27 Cal. 57; 34 Cal. 624.

Subdivision 2.—10 Cal. 589; 22 Cal. 496; 25 Cal. 296; 26 Cal. 615; 28 Cal. 175; 29 Cal. 385; 32 Cal. 219; 34 Cal. 334.

Subdivision 4.—22 Cal. 484; 25 Cal. 122.
Subdivision 6.—10 Cal. 589; 24 Cal. 435.

§ 2078. An offer of compromise is not an admission that any thing is due.

N. Y. C. C. P. § 1863; see Or. C. C. P. § 845.

§ 2079. In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce.

N. Y. C. C. P. § 1864; Or. C. C. P. § 847.

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

SECTION 2083. Evidence may be perpetuated.
2084. Manner of application for order.
2085 Notice of time and place to be given.
2086. Manner of taking the deposition.
2087. Deposition to be filed.
2088. When the evidence may be produced.
2089. Effect of the deposition.

§ 2083. (§ 437.) The testimony of a witness may be taken and perpetuated as provided in this chapter.

Stat. 1851, 120; Stat. 1859, 219, inserted, "or witnesses."
Or. C. C. P. § 848.

§ 2084. (§ 438.) The applicant must produce to a district judge, or to a county judge, an affidavit stating—

1. That the applicant expects to be a party to an action in a court of this state, and in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented, must make an order allowing the examination and prescribing the notice to be given, which notice, if parties are known and reside in this state, must be personally served on them, and if unknown, such notice must be served on the clerk of the county where the property to be affected by such evidence is situated, and a notice thereof published in some newspaper to be designated by the judge making the order.

Stat. 1859, 219, substantially the same, inserting "a petition verified by the oath of the applicant," instead of "affidavit."

Stat. 1851, 120, read: "The applicant shall produce to a district judge, or to a county judge, an affidavit stating—

1. That the applicant expects to be a party to an action, in a court in this state.

2. That the testimony of a witness residing in this state, whose place of residence is stated, is necessary to the prosecution or defense of such action; and generally the facts expected to be proved.

3. That the party named who is expected to be adverse to the applicant, resides or is at the time in this state. The judge may, thereupon, in his discretion, make an order allowing the examination, and prescribing how long before the examination the order and notice of the time and place thereof shall be served."

§ 2085. (§ 439.) Upon proof of service of the notice, the person before whom the depositions are ordered to be taken must proceed to take the depositions of the witnesses named in the petition upon the facts therein set forth, and the taking of the same may be continued, from time to time, in the discretion of such person.

Stat. 1859, 219, substantially the same, inserting "judge" instead of "the person" and "such person."

Stat. 1851, 120, read: "Upon proof of personal service upon the person who is expected to be the adverse party of the order, copy of the affidavit, and of a notice that the examination will be taken before a district judge, or county judge of the county wherein the witness resides, or may be at a specified time and place; such judge may take the deposition of the witness, and the examination may, if necessary, be adjourned from time to time."

§ 2086. (§ 440.) The examination must be by question and answer, *and if the testimony is to be taken in another state, it must be taken upon interrogatories settled in the same manner as in cases of depositions*, unless the parties otherwise agree. The deposition, when completed, must be carefully read to, and subscribed by, the witness, then certified by the judge, and immediately thereafter filed in the office of the clerk of the county where it was taken, together with the order for the examination *of the witness*, the affidavit on which the same was granted, and the affidavit of service of the affidavit, order and notice.

N. Y. C. C. P. § 1868; see Or. C. C. P. § 851.

Stat. 1859, 219, read: "Taken" instead of "completed;" also inserted the words, "of the district court" between "clerk" and "of the county;" also the words, "the petition on which the same was granted, and the proof of service of notice," instead of the last clause beginning with "the affidavit on which," and omitted words in italics.

Stat. 1851, 120, omitted italicized words.

§ 2087. (§ 441.) The affidavits filed with the depositions, or a certified copy thereof, are primary evidence of the facts

stated therein, to show compliance with the provisions of this chapter.

N. Y. C. C. P. § 1869; Or. C. C. P. § 852.

Stat. 1851, 121.

Stat. 1859, 219, inserted "or other proof" after "affidavits;" also omitted the last clause; " also read "*prima facie*" instead of "primary."

§ 2088. (§ 442.) If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses or of their inability to attend the trial by reason of age, sickness or settled infirmity, the depositions or certified copies thereof may be used by either party, subject to all legal objections; but if the parties attend at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination.

N. Y. C. C. P. § 1870; see Or. C. C. P. § 853. Stat. 1859, 219.

Stat. 1851, 121, read: "Affidavit" instead of "petition," and omitted the words, "or between any parties wherein it may be material to establish the facts which such depositions prove or tend to prove."

§ 2089. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

N. Y. C. C. P. § 1871; see Or. C. C. P. § 854.

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

SECTION 2093. Judicial and certain officers authorized to administer oaths.
2094. Form of ordinary oath to a witness.
2095. Form may be varied to suit witness' belief.
2096. Same.
2097. Any person who prefers it may declare or affirm.

§ 2093. (§ 443.) Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations.

N. Y. C. C. P. § 1872; Or. C. C. P. § 856.

Stat. 1851, 121, inserted the words, "of this state" after "court;" also "of the peace" after "justice;" also "in any proceeding" after "evidence;" omitted "or person;" also "in any action or proceeding."

§ 2094. An oath is usually administered as follows: The person who swears, expressing his assent, when addressed in the following form: "You do swear, in the presence of the everlasting God, that the evidence you shall give in this issue (or matter) pending between ——— and ———, shall be the truth, the whole truth and nothing but the truth, so help you God."

See N. Y. C. C. P. § 1873, 1874; and Or. C. C. P. § 857.

§ 2095. Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may in its discretion, adopt that mode.

N. Y. C. C. P. § 1875; Or. C. C. P. § 858.

§ 2096. (§ 444.) When a person is sworn who believes in

any other than the christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

N. Y. C. C. P. § 1876; Or. C. C. P. § 859.
Stat. 1859, 219.

§ 2097. (§ 445.) Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that," etc., as in section two thousand and ninety-four.

N. Y. C. C. P. § 1877; Or. C. C. P. § 860.

Stat. 1851, 121, read: "Any witness who desires it, may at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting when addressed, in the following form: "You do solemnly affirm, that the evidence you shall give in this issue, (or matter) pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth." Assent to this affirmation shall be made by the answer, "I do." A false affirmation or declaration shall be deemed perjury, equally with a false oath."

CHAPTER IV.

GENERAL PROVISIONS.

SECTION 2101. Questions of fact to be decided by the jury, and the evidence addressed to them.
2102. Questions of law addressed to the court.
2103. Questions of fact by court or referees.

§ 2101. All questions of fact, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon addressed to them, except when otherwise provided by this code.

N. Y. C. C. P. § 1879.

4 Cal. 260; 9 Cal. 565; 18 Cal. 376; 32 Cal. 213; 34 Cal. 663; 40 Cal. 272. *Vide* §§ 608, 2061.

§ 2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

N. Y. C. C. P. § 1880.

6 Cal. 119; 15 Cal. 27, 361; 24 Cal. 268; 30 Cal. 548.

§ 2103. The provisions contained in this part of the code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer.

N. Y. C. C. P. § 1881.

Approved March 11, 1873.

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EXTRACTS FROM THE

POLITICAL CODE.

Amendment of Repealed Statute.

§ 330. An Act amending a section of an Act repealed is void.

Construction of the Codes with relation to the laws passed at the present session.

§ 4478. With relation to the laws passed at the present session of the Legislature, the Political Code, Civil Code, Code of Civil Procedure, and Penal Code must be construed as though each had been passed on the first day of the present session.

Laws passed at present session prevail.

§ 4479. If the provisions of any law passed at the present session of the Legislature contravene, or are inconsistent with, the provisions of either of the four Codes, the provisions of such law must prevail.

Construction of Codes with relation to each other.

§ 4480. With relation to each other, the provisions of the four Codes must be construed (except as in the next two sections provided) as though all of such Codes had been passed at the same moment of time and were parts of the same statute.

Conflicts between Titles, which to prevail.

§ 4481. If the provisions of any Title conflict with or contravene the provisions of another Title, the provisions of each Title must prevail as to all matters and questions arising out of the subject matter of such Title.

Conflicts between Chapters, which to prevail.

§ 4482. If the provisions of any Chapter conflict with or contravene the provisions of another Chapter of the same Title, the provisions of each Chapter must prevail as to all matters and questions arising out of the subject matter of such Chapter.

Conflicts between Articles, which to prevail.

§ 4483. If the provisions of any Article conflict with or contravene the provisions of another Article of the same Chapter, the provisions of each Article must prevail as to all matters and questions arising out of the subject matter of such Article.

Conflicting sections of the same Title, which to prevail.

§ 4484. If conflicting provisions are found in different sections of the same Chapter or Article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such Chapter or Article.

[*An Act concerning actions for libel and slander.*

SECTION 1. In an action for libel or slander the Clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred (500) dollars, with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed.

SEC. 2. Each of the sureties on the undertaking mentioned in the first section shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

SEC. 3. Within ten days after the service of the summons the defendants or either of them may give to the plaintiff or his attorney notice that they or he except to the sureties and require their justification before a Judge of the Court or County Judge, at a specified time and place, the time to be not less than five nor more than ten days thereafter, except by consent of parties. The qualifications of the sureties shall be as required in their affidavits.

SEC. 4. For the purpose of justification each of the sureties shall attend before the Judge at the time and place mentioned in the notice, and may be examined on oath touching his sufficiency in such manner as the Judge in his discretion shall think proper. The examination shall be reduced to writing if either party desires it.

SEC. 5. If the Judge find the undertaking sufficient, he shall annex the examination to the undertaking and indorse his approval thereon. If the sureties fail to appear, or the Judge finds the sureties or either of them insufficient, he shall order a new undertaking to be given. The Judge may also at any time order a new or additional undertaking upon proof

that the sureties have become insufficient. In case a new additional undertaking is ordered, all proceedings in the c shall be stayed until such undertaking is executed and fil with the approval of the Judge.

SEC. 6. If the undertaking as required be not filed in fi days after the order therefor, the Judge or Court shall ord the action to be dismissed.

SEC. 7. In case plaintiff recovers judgment, he shall be a lowed as costs one hundred (100) dollars, to cover couns fees, in addition to the other costs. In case the action is di missed, or the defendant recover judgment, he shall be a lowed one hundred (100) dollars, to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly.—Approved March 23, 1872. *Stat.* 1871–2, *p.* 533.]

A LAW QUIBBLE.

A curious point of law was raised on Tuesday, in the Twelfth District Court, in the case of one J. F. Uhlhorn, arrested at the instance of J. C. Bailey on a charge of embezzling and converting to his own use certain property of the defendant, valued at $1,600.

The point raised by defendant's counsel was that the complaint and affidavit for arrest had been sworn to simultaneously, and that the complaint should first have been filed by the Clerk. Judge Dwinelle decided the point well taken, upon the authority of an unreported decision of the Supreme Court rendered by Judge Shafter *in ex parte* Lamson, and accordingly issued an order for the discharge of the prisoner.

Governor Booth made the following appointments to-day: Lewis Cunningham, State Harbor Commissioner in and for the city of San Francisco for the term prescribed by law, vice John J. Marks, resigned. William McPherson, of Missouri, Commissioner of Deeds for California, to reside in St. Louis, Mo. George W. Browne, of New York, Commissioner of Deeds, to reside in New York City; and Edward J. Jones, of Massachusetts, Commissioner of Deeds, to reside in Boston.